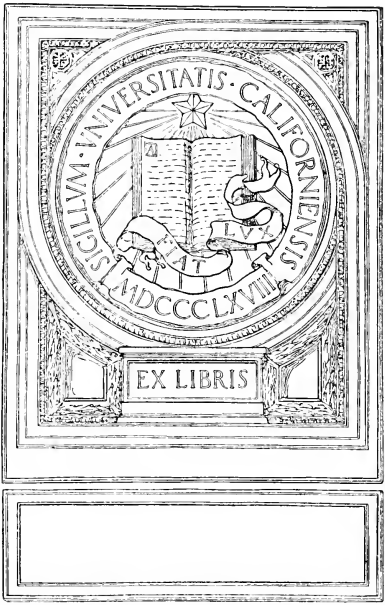
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# The Panama Canal Tolls Controversy

OR

*A Statement of the Reasons for the Adoption and Maintenance of the Traditional American Policy in the Management of the Panama Canal*

WITH INTRODUCTIONS BY

WILLIAM J. BRYAN, Secretary of State
OSCAR S. STRAUS, Member of the Hague Court
WM. HUGHES, United States Senator

By

HUGH GORDON MILLER

of the New York Bar, former Special Assistant to the Attorney-General of the United States

*and*

JOSEPH C. FREEHOFF, PH. D.

Statistician with the Public Service Commission for New York City

BOSTON
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1914

# Dedicated

to

## PRESIDENT WOODROW WILSON

(DEMOCRAT)

*who in his efforts to secure the repeal of the tolls-exemption clause of the Panama Canal act, took and successfully maintained as exalted moral, courageous and patriotic a position as was ever taken and maintained by any Executive of any nation;*

## SENATOR ELIHU ROOT

(REPUBLICAN)

*former Secretary of State and authority on international questions, whose persistent efforts and unanswerable arguments contributed most in support of the President to secure the repeal of the foregoing statute; and*

## HON. OSCAR S. STRAUS

(PROGRESSIVE)

*Minister and late Ambassador to Turkey; member of the Permanent Court of Arbitration at the Hague, succeeding Benjamin Harrison, ex-President; lawyer, author, statesman and authority on matters of diplomacy, for using his great influence in favor of the repeal of the foregoing clause repugnant to the Hay-Pauncefote Treaty.*

# CONTENTS



## APPENDICES

# PREFACE

THIS work was undertaken for the purpose of showing the meaning of the Hay-Pauncefote treaty; and, while the subject is uppermost in public attention, to give that meaning the widest possible publicity.

We concluded, upon examination of the record after President Wilson's brief message asking the Congress to repeal the tolls-exemption clause of the Panama Canal act, that many honest, sincere and patriotic American citizens had, as we ourselves had before examining the subject in a judicial frame of mind, assumed basic conditions contrary to the actual record, and that many had argued upon popular misconceptions of vital facts.

We aimed to present a conclusive statement of facts demonstrating that the United States cannot grant free transportation through the Panama Canal to its coastwise and foreign shipping without violating the Hay-Pauncefote treaty.

This work is primarily a source book. Chapter I contains the traditional documents and the sections of other treaties which assist one in ascertaining the real meaning of the Hay-Pauncefote treaty. The letters of the negotiators of the treaty supplement these data. By comments and the use of quotations, we aimed to weave this material into a connected whole so that the

real meaning of the Hay-Pauncefote treaty would stand out distinctly.

In Chapter II we assembled able arguments of public men in favor of the repeal of the tolls-exemption clause of the Panama Canal act. This Chapter and Chapter I are primarily designed to be sources of documents, excerpts from treaties, letters and arguments by others. It is believed that therein are assembled all the documents and arguments necessary to arrive at a correct conclusion. These documents and arguments are widely scattered. They are here assembled in one volume for the convenience of those desiring a correct understanding of this memorable controversy.

Chapters I and II contain the essential documents bearing on the meaning of the treaty and excerpts from convincing arguments in favor of the repeal of the tolls-exemption clause of the Panama Canal act. These are woven into a connected statement thus combining the source book and connected argument method. It seemed to the authors that this would be the most effective method of presenting the data having a bearing on the meaning of the treaty and the arguments showing that meaning.

Owing to the nature of the material used and the manner of using it, it was not always possible to give adequate credit. Readers of the able speeches of Senators Root, McCumber, Burton and Representative Stevens will readily see that great use has been made of their arguments. The addresses of these three Senators and of Representative Stevens are the principal source of the secondary material used in this work.

In Chapter III we have supplemented the meager data on the financial aspects of the question by an extended original discussion of the business and public utility aspect of the Panama Canal. The argument is based on the fact that our traditional policy, the clause of the treaty, "Such conditions and charges of traffic shall be just and equitable," and the method adopted in securing title to the Canal Zone obligate the United States to treat this international waterway as a public utility. The financial and commercial policy that the United States must adopt to conform thereto is outlined. It is shown that this policy is in complete harmony with the Hay-Pauncefote treaty.

The work contains some repetition. Because of the number of sources from which the material used was drawn, repetition could not have been avoided. It would not have been desirable to have avoided it entirely if it could have been easily done. All minds are not equally mature and so it may well be that the method of here a little and there a little from different standpoints is the way of correct understanding.

Fundamental principles and important documents are involved in the consideration of a question like this, and, as they have a bearing on the various standpoints from which the question was considered, repetition was inevitable. We aimed to assemble that which would be most effective from many sources and to weave it into a connected whole. This makes accessible in a single volume all that is worth while that has any bearing on the tolls-exemption controversy.

It is customary for quotations to be printed solid in order to set them apart from the context. It was not found feasible to do so in this work owing to the extent to which quotations have been used. Quotations within quotations are printed solid in order to differentiate them from the quotations of which they are a part.

This work was well advanced before the tolls-exemption clause of the Panama Canal act was repealed. Its tone is argumentative—urging repeal. The same arguments will apply if any attempt is made to re-enact the clause or a similar one. That is why this work was undertaken and proseeuted to its final conclusion—publication. Its sole object is opposition to tolls-exemption inasmuch as it would violate the Hay-Pauncefote treaty.

The tolls-exemption clause of the Panama Canal act is repealed. This is primarily due to the efforts of those members of the Democratic Party who loyally supported the President. Paramount credit is due to them. Able addresses in favor of the repeal of this statute were delivered by them in the Senate and in the House. To have used excerpts from these speeches would have resulted in needless repetition. Suffice it to say that excerpts therefrom could have been used in place of arguments actually used without impairment of the strength of the narrative.

The tolls-exemption clause of the Panama Canal act was clearly in violation of the Hay-Pauncefote treaty, and reversed the traditional policy of the United States. This work was prepared in the hope that it would assist in keeping tolls-exemption for our coastwise and foreign commerce in a state of innocuous desuetude.

During the McKinley administration the Hay-Pauncefote treaty was negotiated. Before it was signed Roosevelt had become President. His first public utterance as President was to the effect that he would keep unbroken the policies of William McKinley. Roosevelt kept the faith. The McKinley-Hay canal policy was kept unbroken.

Observe Roosevelt's own statement in its proper setting:

Mr. Hay, in transmitting the Hay-Pauncefote treaty to the President, writes:

"I submit for your consideration * * * a convention * * * to remove any objection which may arise out of the * * * Clayton-Bulwer treaty * * * without impairing the '*general principle*' of neutralization established in Article 8 of that convention."

President Roosevelt, in transmitting the treaty to the Senate, says:

"I transmit, for the advice and consent of the Senate to its ratification, a convention signed November 18, 1901, * * * to remove any objection which may arise out of the convention of April 19, 1850, * * * to the construction of such canal under the auspices of the Government of the United States without impairing the '*general principle*' of neutralization established in Article 8 of that convention."

The following is the "*general principle*" as understood at that time by those who negotiated the treaty:

"It is always understood by the United States and Great Britain that the parties constructing or owning the same—the interoceanic communication—shall impose no

other charges or conditions of traffic thereupon than are just and equitable, and that the same canals or railways, being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other state."

The "general principle" had the unqualified approval of President McKinley. Note the following by Secretary of State Hay:

"The President was, however, not only willing but desirous that '*the general principle*' of neutralization referred to in the preamble of this treaty should be applicable to this canal now intended to be built, notwithstanding any change of sovereignty or of international relations of the territory through which it should pass. This '*general principle*' of neutralization had always in fact been insisted upon by the United States."

President Roosevelt kept the faith as stated above. Note the following:

President Roosevelt, in submitting the second Hay-Pauncefote treaty, said:

"It specifically provides that the United States alone shall do the work of building and assume the responsibility of safeguarding the canal and shall regulate its neutral use by all nations on terms of equality without the guaranty of interference of any outside nation from any quarter." * * *

Again, he says, on January 4, 1904, in a special message:

"* * * Under the Hay-Pauncefote treaty it was explicitly provided that the United States should control,

police and protect the canal which was to be built, *keeping it open for the vessels of all nations on equal terms.* The United States thus assumes the position of guarantor of the canal and of its peaceful use by all the world."

In a note by Secretary Hay on the following day, he states:

" * * * The Clayton-Bulwer treaty was conceived to form an obstacle, and the British Government therefore agreed to abrogate it, the United States only promising in return to protect the canal and keep it open on equal terms to all nations, *in accordance with our traditional policy.*"

The meaning of the Hay-Pauncefote treaty is made clear in the following by Secretary Hay:

"More direct and convincing is the evidence of Willis Fletcher Johnson, a journalist of the highest standing, who recalls distinctly a conversation with Secretary Hay in 1904 to this effect:

"I asked Colonel Hay plumply if the treaty meant what it appeared to mean on its face, and whether the phrase, 'vessels of all nations,' was intended to include our own shipping, or was to be interpreted as meaning 'all other nations.' The Secretary smiled, half indulgently, half quizzically, as he replied:

" 'All means all. The treaty was not so long that we could not have made room for the word 'other' if we had understood that it belonged there. 'All nations' means all nations, and the United States is certainly a nation.'

" 'That was the understanding between yourself and Lord Pauncefote when you and he made the treaty?' I pursued.

"'It certainly was,' he replied. 'It was the understanding of both Governments, and I have no doubt that the Senate realized that in ratifying the second treaty without such an amendment it was committing us to the principle of giving all friendly nations equal privileges in the canal with ourselves. That is our Golden Rule.'"—*Harvey.*

Ambassador Choate confirms this construction of the Hay-Pauncefote treaty in the following:

"It is true that I had something to do with the negotiation of this treaty. In the summer of 1901—you will remember that the treaty was ratified by the Senate in November, 1901—I was in England until October and was in almost daily contact with Lord Pauncefote and was also in very frequent correspondence with Mr. Hay, our Secretary of State, under whom I was acting.

"As the lips of both of these diplomatists and great patriots, who were each true to his own country, and each regardful of the rights of others, are sealed in death, I think it is quite proper that I should say what I believe both of them, if they were here, would say today, that the clause in the Panama Canal bill exempting coastwise American shipping from the payment of tolls is in direct violation of the treaty. I venture to say now that in the whole course of the negotiation of this particular treaty, no claim, no suggestion, was made that there should be any exemption of anybody."

It is evident that Roosevelt as President, John Hay as Secretary of State and Joseph H. Choate as Ambassador to Great Britain gave Great Britain to understand and Great Britain did understand when the Hay-Pauncefote

fote treaty was prepared and proclaimed that the "*general principle*" found in Article VIII of the Clayton-Bulwer treaty was preserved unimpaired.

The Roosevelt administration gave Great Britain to understand that the United States would construct and operate the canal "*for the benefit of mankind on equal terms to all*" as the mandatory of civilization. The Taft administration sought to deprive Great Britain of the foregoing right by the tolls-exemption clause of the Panama Canal act. The Wilson administration restored to Great Britain, in the repeal of the tolls-exemption clause of the Panama Canal act, her rights under the Hay-Pauncefote treaty.

President Wilson asked this of Congress in the following message, worthy of the occasion:

"Gentlemen of the Congress: I have come to you upon an errand which can be very briefly performed, but I beg that you will not measure its importance by the number of sentences in which I state it. No communication I have addressed to the Congress carried with it graver or more far-reaching implications as to the interest of the country, and I come now to speak upon a matter with regard to which I am charged in a particular degree, by the Constitution itself, with personal responsibility.

"I have come to ask you for the repeal of that provision of the Panama Canal act of August 24, 1912, which exempts vessels engaged in the coastwise trade of the United States from payment of tolls, and to urge upon you the justice, the wisdom, and the large policy of such a repeal with the utmost earnestness of which I am capable.

"In my own judgment, very fully considered and maturely formed, that exemption constitutes a mistaken economic policy from every point of view, and is, moreover, in plain contravention of the treaty with Great Britain concerning the canal concluded on November 18, 1901. But I have not come to urge upon you my personal views. I have come to state to you a fact and a situation. Whatever may be our own differences of opinion concerning this much debated measure, its meaning is not debated outside the United States. Everywhere else the language of the treaty is given but one interpretation, and that interpretation precludes the exemption I am asking you to repeal. We consented to the treaty; its language we accepted, if we did not originate it; and we are too big, too powerful, too self-respecting a Nation to interpret with a too strained or refined reading the words of our own promises just because we have power enough to give us leave to read them as we please. The large thing to do is the only thing we can afford to do, a voluntary withdrawal from the position everywhere questioned and misunderstood. We ought to reverse our action without raising the question whether we were right or wrong, and so once more deserve our reputation for generosity and for the redemption of every obligation without quibble or hesitation.

"I ask this of you in support of the foreign policy of the administration. I shall not know how to deal with other matters of even greater delicacy and nearer consequence if you do not grant it to me in ungrudging measure."

The high moral purpose of this memorable state paper is recognized abroad. Sir Edward Grey, the British

Foreign Secretary, complemented it in a speech in the House of Commons. In the course of his remarks, he exposed misrepresentation, and, in so doing, revealed the exalted sense of justice of our President. The following excerpts from Sir Edward Grey's speech should have the widest circulation:

"It is due to the President of the United States and to ourselves that I should so far as possible clear away that misrepresentation. It was stated in some quarters that the settlement was the result of bargaining or diplomatic pressure. Since President Wilson came into office no correspondence has passed, and it ought to be realized in the United States that any line President Wilson has taken was not because it was our line, but his own.

"President Wilson's attitude was not the result of any diplomatic communication since he has come into power and it must have been the result of papers already published to all the world.

"It has not been done to please us or in the interests of good relations, but I believe from a much greater motive—the feeling that a government which is to use its influence among the nations to make relations better must never when the occasion arises flinch or quail from interpreting treaty rights in a strictly fair spirit."

The following is in harmony therewith:

"London, July 4.—Viscount Bryce, former British Ambassador to the United States, speaking at the Independence Day dinner of the American Society, held at the Savoy tonight, paid a high tribute to President Wilson. He said:

" 'Courage is a virtue rare among politicians. What we have all admired in the President is his courage in the matter of the canal tolls.'

" 'Absolutely no pressure was brought to bear by Great Britain to obtain repeal of the tolls-exemption clause of the Panama Canal act,' he said. He (James Bryce) had told his Government that if President Wilson thought it right to repeal the clause or submit the matter to arbitration he would do it.

"Ambassador Page said the last British letter to the United States Government relating to the canal was written by Ambassador Bryce before the end of the Taft administration."

President Wilson's attitude toward the tolls-exemption clause of the Panama Canal act was reaffirmed in his Fourth of July address at Independence Hall. It is reported as follows:

"I say that it is patriotic sometimes to prefer the honor of the country to its material interest. Would you rather be deemed by all nations of the world incapable of keeping your treaty obligations in order that you might have free tolls for American ships? The treaty under which we gave up that right may have been a mistaken treaty, but there was no mistake about its meaning.

"When I have made a promise as a man I try to keep it, and I know of no other rule permissible to a nation. The most distinguished nation in the world is the nation that can and will keep its promises even to its own hurt. And I want to say, parenthetically, that I do not think anybody was hurt. I cannot be enthusiastic for subsidies to a monopoly, but let those who are enthusiastic

for subsidies ask themselves whether they prefer subsidies to unsullied honor."

Tolls-exemptions is a question in which international and not domestic considerations are controlling. As such, political considerations should not have entered into or influenced its discussion. Therefore, a work of this character is properly prepared by persons not members of President Wilson's party but who are in complete agreement with him. The authors of this work are in complete accord with the President's interpretation of the Hay-Pauncefote treaty. As enrolled members of the Progressive Party, they were also politically qualified for the undertaking. This is one reason why preference was given, in the use of quotations, to arguments advanced by members of the Republican Party.

The controlling reason was the fact that Senators Root, Burton, Lodge, McCumber and Representative Stevens were, at the time, in an official way in touch with negotiators of the Hay-Pauncefote treaty and had first-hand knowledge of the intent of the negotiators. They were in a position to learn the truth and they did.

The then administration was Republican. They belonged to the inner political circle or were affiliated with a member or members of that circle. *Therefore, what they say in support of the tolls policy of the President is of such importance that it should be final with reasonable men.*

This work is published for the purpose of showing that the Hay-Pauncefote treaty is a world-pact, and, as interpreted by Sir Edward Grey, is an agreement without a flaw as far as concerns all parties in interest. It should be continued without modification as long as the Panama

Canal endures. If this work contributes aught to secure this end, the result will have justified its publication.

The notable introductions to this work by Secretary Bryan, ex-Ambassador Straus and Senator Hughes make this book to an appreciable degree their handiwork. The authors share with them whatever merit it has and whatever success it may attain.

We pause to record our deep appreciation for courtesies shown us in the preparation of this work by Senator Hughes of New Jersey. Words cannot adequately express the extent of our obligations and of our gratefulness to the Senator.

# INTRODUCTION

DEPARTMENT OF STATE,
WASHINGTON,

September 4, 1914.

HON. HUGH GORDON MILLER and
PROFESSOR JOSEPH C. FREEHOFF,
220 Broadway,
New York, N. Y.

*Gentlemen:—*

I have read the preface to your proposed volume entitled, "The Panama Canal Tolls Controversy," and beg to commend both the purpose and the style of the work. From the outline of the book's contents, as set forth in the preface, I feel sure that the publication will be of great value to the public, and will assist American citizens to understand the merits of the question.

The position taken by the President on the tolls question aroused more opposition at that time than it would arouse today, subsequent events having completely vindicated the wisdom of his action.

The enviable position which our nation occupies today is due, in part, to the fact that it has allowed no doubt to exist as to its purpose to live up to the stipulations of its treaty.

There were economic considerations which weighed heavily in favor of the repeal of the free tolls law, but these were less important than those which affected the international standing of our nation.

A government must be above suspicion in the matter of good faith: no pecuniary advantage, even where such an advantage actually exists, can for a moment justify the violation of a treaty obligation, and violation must be the more scrupulously avoided if the question is one which is not to be submitted to arbitration.

In international matters the question is not whether we are ourselves certain of our Government's purpose in the position taken, but whether other nations, also, have confidence in our rectitude.

The President set a high standard and the support given to him in the Senate and House was as creditable to Congress as it was complimentary to him. The popular approval which is now accorded to both the President and Congress on this subject is proof positive that the people can be trusted to pass judgment upon the merit of international, as well as domestic, questions.

Your book will be a reference book to those who have already informed themselves, while it will furnish instruction to those who have not heretofore been in position to sit in judgment upon the principle involved and the facts adduced in support of the action taken.

Very truly yours,

(Signed) WM. J. BRYAN.

# INTRODUCTION

There is no more honorable chapter in the highly creditable history of the diplomacy of our country than the repeal of the PANAMA TOLLS ACT under the present administration. Being a controversy affecting our international relations, it is gratifying that, aside from the leadership of the President, the repeal was effected not solely by the party in power, but by the help of leaders in all three parties, rising above the plane of partisan politics to the higher reaches of broad statesmanship, guided by a scrupulous regard for our international character in accord with "a decent respect for the opinions of mankind," as expressed in the Declaration of Independence.

The debates in Congress upon the subject of repeal proved to be of a quality in learning, ability and eloquence in keeping with the best traditions of our national legislature. Some of the leading Democratic members of the Senate and the House opposed the President's recommendations for the repeal, while some of the leading members of the opposition effectively supported the President. The debates in Congress and the discussion by distinguished publicists developed three distinct points of view. Former President Taft, who when President approved the Panama Act, held substantially that the Act did not violate our treaty obligations, and therefore we had a right to exempt our ships from tolls. A similar position was taken by Senator O'Gorman and Representative

Underwood, the Administration leaders in the Senate and the House, and other prominent Democrats, some of whom took the ground that there was no basis for arbitration because the question was clear and undoubted, that the provision of our score or more of treaties providing for arbitration when the construction of a treaty was involved did not apply, as there was nothing to arbitrate.

A second group of opponents to the repeal held with former President Roosevelt, who will be recognized in history as the father of the Panama Canal, and whose former action and justified course, when all the facts are taken in consideration, free from partisan bias, made it possible for us to build the Canal; he held, while we have the right under the treaties to exempt our coastwise ships from toll, yet, as the Panama Act involved the construction of treaties, it was our duty to arbitrate if arbitration was demanded by Great Britain.

A third group, led by Senator Root, whose speech in the Senate will be treasured as a classic in our Congressional debates, maintained that the Panama Act was so plainly in violation of our treaty obligations both in letter and in spirit as confirmed by the negotiators and the negotiations of the Hay-Pauncefote treaties, that it was our plain duty to repeal the exemption clause of the Act. The position of President Wilson, as taken in his Special Message to Congress, placed him in a group by himself. In his appeal on moral and international grounds to Congress he said: "The large thing to do is the only thing we can afford to do, a voluntary withdrawal from a position everywhere quoted and misunderstood. We ought to reverse our action without raising the question whether we were right or wrong, and so once more deserve

our reputation for generosity and for the redemption of our every obligation without quibble or hesitation."

President Taft, in signing the PANAMA CANAL ACT, which was approved by him on the 24th of August, 1912, filed a memorandum wherein he stated that in a message to Congress he had suggested a possible amendment by which all persons and especially British subjects who felt aggrieved by its provisions on the ground that they are in violation of the Hay-Pauncefote treaty, might try that question out in the Supreme Court of the United States. This raises a constitutional question about which there is much misconception, namely, the conflict between a treaty and a later act of Congress. Article II, Section 1 of the Constitution provides that the laws of the United States and all treaties made under the authority of the United States shall be the supreme law of the land. There have been many decisions of the Supreme Court upon the subject which, if read apart from the specific issues involved, are apt to confuse. This subject cannot be adequately considered in this introduction, and therefore I shall content myself with quoting from Justice Miller's decision in the Supreme Court, in the Head Money Cases, 112 U. S. He says:

"A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the Governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. *It is obvious that with all this the judicial courts have nothing to do and can give no redress.*"

The authors of this book, by learning and ability, are equipped to present "THE PANAMA CANAL TOLLS CONTROVERSY" with an impartial spirit, and they have rendered a useful service in presenting in a clear and connected form this important chapter in our legislative history, together with its bearing upon our international obligations. In the repeal of the Tolls Provision of the Panama Act, we were not cringing or yielding to either Great Britain or to any other foreign power; we were actuated not by a spirit of weakness, as some of the opponents of the repeal charged, but by a spirit of conscientious righteousness and of conscious strength. We yielded to our own exalted sense of public honor to the credit of this and future generations of America.

The example we have set will not be forgotten. That it was rightly interpreted by the chancelleries of the world and by Great Britain is shown by the speech made by Sir Edward Grey, her Secretary of State for Foreign Affairs, in the House of Commons. He said:

"It has not been done to please us, or in the interest of good relations, but I believe from a much greater motive—the feeling that a Government which is to use its influence among nations to make relations better must never, when the occasion arises, flinch or quail from interpreting treaty rights in a strictly fair spirit."

This statement has a peculiar, if not prophetic significance in connection with the expressed reasons presented by Sir Edward Grey which impelled Great Britain to take part in this gigantic and deplorable war now devastating the European world.

OSCAR S. STRAUS.

# INTRODUCTION

UNITED STATES SENATE

WASHINGTON, D. C.

In this work, the authors have established the correctness of President Wilson's Panama Canal Tolls policy. They hold that the Hay-Pauncefote treaty is a world pact, and, as now construed, is an international agreement without a flaw. In this they are in full accord with the late President McKinley and his great Secretary of State, John Hay, by whom the treaty was negotiated.

In the dedication they show their appreciation of President Wilson in the following:

PRESIDENT WOODROW WILSON

(Democrat)

who in his efforts to secure the repeal of the tolls-exemption clause of the Panama Canal Act, took and successfully maintained as exalted moral, courageous and patriotic a position as was ever taken and maintained by any Executive of any nation.

That the great Secretary of State, William Jennings Bryan—confronted in this great international upheaval and calamity with graver questions and greater burdens in actual labor than have confronted any Secretary since the Republic was founded (in which tremendous labor

I happen to know he is and has been engaged with all his soul, body and mental faculties, which were long ago dedicated to his country and the final and permanent peace of the world, a cause now so rudely and suddenly interrupted, leaving his Government apparently, and for the time being, at least, its only hope and repository), should pause those labors to write an introduction to the book and commend its purpose and style, shows its importance now and for the future. The same can be said of the introduction (a substantial contribution in itself to the value of the work) by Hon. Oscar S. Straus, member for the United States of the Permanent Court of Arbitration at the Hague, and, with the single exception of Colonel Roosevelt, the most prominent member of the leading minority (Progressive) party in the last national election; who, while the central figure at Washington, in an effort to bring about peace in Europe, paused to examine the manuscript and commend the work. No further comment on the importance or excellence of the work is necessary.

This book is intelligently conceived and well executed. It is on an important international question on which an enlightened public opinion is most desirable. It states the correct view on this question in a clear, logical and convincing argument. I commend it to the public as a creditable contribution to the discussion of the question.

The chapter which treats of the financial aspects of tolls-exemption is a novel contribution to the subject. It applies the principle developed in the regulation of national, state and municipal utilities to the management of the Panama Canal—an international utility whereof

the United States is merely trustee. It shows that the sentence of the Hay-Pauncefote treaty:

"Such conditions and changes of traffic shall be just and equitable" obligates the United States to manage it as a public utility, that is, for the benefit of mankind "on equal terms to all."

This chapter alone makes the work one of merit and commends it to the considerate attention of the public.

The work as a whole makes a searching analysis of the data (historical and contemporary)bearing on the meaning of the Hay-Pauncefote treaty, and shows the meaning that the data reveal in forceful English. It makes effective use of the conclusions arrived at by others. Thus the reader will get a comprehensive survey of the whole question in a single volume.

The authors of this work are members of the Progressive Party. Their vigorous defense of an important policy of a President belonging to another party is remarkable, and shows a commendable spirit. They aim at the elimination of tolls-exemption from domestic politics. To further this object, they have quoted extensively from Republican addresses while recognizing the great merit of contemporary Democratic addresses in the Senate and the House. The Democratic Party is given paramount credit for the repeal of the tolls exemption clause of the Panama Canal Act.

The tolls-exemption clause of the Panama Canal Act is repealed due to the zeal, sustained effort of exalted moral purpose of the President, supported by the great majority of the members of his own party. Re-enact-

ment of such a statute should be made impossible. This book is a sane, forceful and unanswerable statement of the case against the right of the United States to exempt any of its shipping, coastwise and foreign, through the canal, as was proposed in the foregoing statute which was declared to be repugnant to the Hay-Pauncefote treaty.

This work should contribute much to the formation of a sound public opinion on this extremely delicate international question and thereby aid in eliminating it from domestic politics. Tolls-exemption is a dangerous question because of its susceptibility to the uses of the political demagogue. We own the canal and are sovereign in the Canal Zone. It is, therefore, only right and proper that we should manage it as we please. Why knuckle down to England? Such half-truths as these are more misleading than deliberate falsehoods, and make this question an annoying political issue because wrong may easily gain ascendancy. Therefore, all good citizens, regardless of party, should aid in forming a sound public opinion on this question. This is an admirable handbook for use in this connection.

Candidates for membership in the House of Representatives and the United States Senate who are opposed to the policy of tolls-exemption will find this work a great help in conclusively answering opponents who favor tolls-exemption. They can effectively point to its authorship by two members of the Progressive Party and quote therefrom unanswerable arguments taken from notable addresses in favor of the repeal of the tolls-exemption clause of the Panama Canal Act by members of the Republican Party.

Of the joint authors of this work, one is a distinguished member of the Bar of the Supreme Court of the United States, was a Federal Attorney under the McKinley administration and Special Assistant to the Attorney-General of the United States in charge of important cases in that Court and elsewhere under the administrations of both Roosevelt and Taft; was an important Commissioner of the State of New York under the administrations of Governors Higgins and Hughes, and held an important commission to go abroad under the Taft administration. He is a member of the State Committee of the Progressive Party in New York, one of the organizers and principal supporters of that party, and its choice in the fusion movement of 1913 for Supreme Court Justice. The other, also a prominent Progressive, and a former Professor of Political Economy in Cornell College, is now statistician with the Public Service Commission for New York City and hence as well qualified to discuss the financial, economic as well as the public utility phases of the Canal tolls problem as any other authority in the United States. Both authors, therefore, are peculiarly qualified, professionally and politically, to prepare the history of this vital and lately menacing problem without bias toward the President or the party happening to be in power at the time of the repeal of the tolls-exemption clause of the Panama Canal Act complained of by practically all of the maritime nations of the world.

Having been a member of Congress in 1912 when the Canal Act was passed with the objectionable clause, and a member of the United States Senate in 1914 when the

same was repealed, and having heard the notable and exhaustive debates on the subject on both occasions, I am justified in saying, after an examination of the work, that the essence of the whole matter is contained in this volume. In my judgment it will at once become the authoritative work on this great question, not only in the United States, but in all nations interested in the use of the Panama Canal.

I may also add that the manuscript of this book was shown to President Wilson, who examined it hurriedly. He then stated that it appeared to him "to have been most intelligently conceived and well executed," and that "it would stand securely on its own merits."

Further commendation of this work—*The Panama Canal Tolls Controversy*—is unnecessary. It should be as widely circulated as possible by those who believe that the United States should manage the Panama Canal in accordance with the *world-view design* embodied in the Hay-Pauncefote treaty.

WILLIAM HUGHES,

*United States Senator from New Jersey.*

## CHAPTER I

### *The Meaning of the Hay-Pauncefote Treaty*

Early Spanish explorers ascended every river of Central America for the purpose of finding a passage through which their vessels might reach those lands of boundless wealth of which Marco Polo had given a vivid description. They were bent on finding the shortest route from Cadiz to Cathay, and thus sought a natural interoceanic waterway.

With the advent of settlements arose the idea of artificial transit across the Isthmus. A wagon road was built from Porto Bello to Panama in the sixteenth century. More ambitious projects flourished and decayed during the lapse of centuries. They furnish a history of failure and blighted hopes. Spain, Holland, Belgium, France and England were at one time or another interested in the construction of an Isthmian Canal.

The United States became interested in 1826. Henry Clay, Secretary of State, wrote to our representatives to the Panama congress held that year:

"A cut or a canal for purposes of navigation somewhere through the Isthmus that connects the two Americas to unite the Pacific and Atlantic Oceans will form a proper subject of consideration at the congress. That vast object, if it should be ever accomplished, will be interesting in a greater or less degree to all parts of the world. But

to this continent will probably accrue the largest amount of benefit from its execution, and to Colombia, Mexico, the Central Republic, Peru and the United States more than to any other of the American nations. What is to rebound to the advantage of all America should be effected by common means and united exertions and should not be left to the separate and unassisted efforts of any one power. * * * *If the work should ever be executed so as to admit of the passage of sea vessels from ocean to ocean, the benefits of it ought not to be exclusively appropriated to any one nation, but should be extended to all parts of the globe upon the payment of a just compensation or reasonable tolls.*"

The declaration by the then Secretary of State that the benefits of the canal should be extended to all parts of the globe and should not be exclusively appropriated by any nation has been confirmed by American statesmen of all parties—Whig, Democratic and Republican—with substantial unanimity. The principle has been enunciated by presidential messages, by instructions from Secretaries of State and by resolutions of the House and Senate of Congress.

Senator Burton is credited with the following:

"The romantic triumphs of Decatur, Bainbridge and the other heroes of our early days against the Barbary pirates of the Mediterranean were particularly notable because they secured to our commerce and to the commerce of other nations the assurance of safety in those waters without the payment of ransom or tribute. * * * If there is one policy to which as a nation we have been committed during the entire time of our existence, it is

that of neutralization of waterways and the use of all waterways, natural and artificial, by all nations on equal terms. Our country was one of the most active in protesting against the sound dues imposed by the Danish Government, although ships had to pass from the North Sea to the Baltic Sea within cannon shot of shore, and these channels were furnished by the Danish Government with such aids to navigation as lights and buoys. We insisted upon the continued neutralization of the Strait of Magellan. In 1879 Mr. William M. Evarts, then Secretary of State, declared that the United States would not tolerate exclusive claims by any nation whatsoever to the Strait of Magellan and would hold any nation responsible that might undertake by any pretext to lay any impost or check on the commerce of the United States through that strait."

The foregoing shows the traditional policy of the United States in its formative period. We will trace its development.

In the year 1835, during the administration of President Jackson, the Senate of the United States unanimously adopted a resolution, as follows:

"*Resolved*, That the President of the United States be respectfully requested to consider the expediency of opening negotiations with the Governments of other nations, and particularly with the Governments of Central America and New Granada, for the purpose of effectually protecting, by suitable treaty stipulations with them, such individuals or companies as may undertake to open a communication between the Atlantic and Pacific Oceans by the construction of a ship canal across the isthmus

which connects North and South America, and of securing forever by such stipulations *the free and equal right of navigating such canal to all such nations* on the payment of such reasonable tolls as may be established to compensate the capitalists who may engage in such undertaking and complete the work."

During the administration of President Van Buren, in a report to the House of Representatives March 2, 1839, Mr. Mercer, of Virginia, from the Committee on Roads and Canals, stated:

"The policy is not less apparent which would prompt the United States to co-operate in this enterprise, liberally and efficiently, before other disposition may be awakened in the particular State within whose territory it may be ceded *or other nations* shall seek by negotiations *to engross a commerce which is now and should ever continue open to all.*"

In the same year the House of Representatives by unanimous vote adopted a resolution much the same as that of the Senate in 1835, requesting the President—"to consider the expediency of opening or continuing negotiations with the Governments of other nations, and particularly with those the territorial jurisdiction of which comprehends the Isthmus of Panama, and to which the United States have accredited ministers or agents, for the purpose of ascertaining the practicability of effecting a communication between the Atlantic and Pacific Oceans by the construction of a ship canal across the Isthmus *and of securing forever by suitable treaty stipulations the free and equal right of navigating such canal by all nations.*"

In a letter to Mr. Buchanan, Secretary of State,

on December 17, 1845, the commissioner accredited to examine a canal route said:

"Like all other international questions, it can only be satisfactorily adjusted by concert with the other maritime powers which have similar interests, more or less important, and whose assent is necessary to place the proposed passage under the protection and guaranty of the public law, recognized by the whole world."

In the treaty of 1846 with New Granada occurs the following:

"Any modes of communication that now exist, or that may be hereafter constructed, shall be open and free to the Government and citizens of the United States, and for the transportation of any articles of produce, manufactures or merchandise of lawful commerce belonging to the citizens of the United States; that no other tolls or charges shall be levied or collected upon the citizens of the United States, or their said merchandise thus passing over any road or canal that may be made by the Government of New Granada, or by the authority of the same, than is, under like circumstances, levied upon and collected from the Granadian citizens."

On the conclusion of the treaty with New Granada in 1846 President Polk submitted it to the Senate with a message, in which he said:

"In entering into the mutual guarantees proposed by the thirty-fifth article, neither the Government of New Granada nor that of the United States has a narrow or exclusive view. *The ultimate object*, as presented by the Senate of the United States in their resolution (March 3, 1835), to which I have already referred, *is to secure*

*to all nations the free and equal right of passage over the Isthmus.*"

## THE CLAYTON-BULWER TREATY

This treaty was adopted July 5, 1850. The territorial background as it then existed and the clearly defined neutralization policy developed in prior administrations are the causes of which the contents of this treaty are the resultant. In the foregoing, we outlined the then American isthmian canal policy. The territorial background is clearly stated in the following by Senator Root:

"In the year 1850, there were two great powers in possession of the North American continent to the north of the Rio Grande. The United States had but just come to its full stature. By the Webster-Ashburton treaty of 1842 our northeastern boundary had been settled, leaving to Great Britain that tremendous stretch of seacoast including Nova Scotia, New Brunswick, Newfoundland, Labrador and the shores of the Gulf of St. Lawrence, now forming the Province of Quebec. In 1846 the Oregon boundary had been settled, assuring to the United States a title to that vast region which now constitutes the States of Washington, Oregon and Idaho. In 1848 the treaty of Guadalupe-Hidalgo had given to us that great empire wrested from Mexico as a result of the Mexican War, which now spreads along the coast of the Pacific as the State of California and the great region between California and Texas.

"Inspired by the manifest requirements of this new empire, the United States turned its attention to the possibility of realizing the dream of centuries and connecting

its two coasts—its old coast upon the Atlantic and its new coast upon the Pacific—by a ship canal through the Isthmus; but when it turned its attention in that direction it found the other empire holding the place of advantage. Great Britain had also her coast upon the Atlantic and her coast upon the Pacific, to be joined by a canal. Further than that, Great Britain was a Caribbean power. She had Bermuda and the Bahamas; she had Jamaica and Trinidad; she had the Windward Islands and the Leeward Islands; she had British Guiana and British Honduras; she had, moreover, a protectorate over the Mosquito Coast, a great stretch of territory upon the eastern shore of Central America which included the river San Juan and the valley and harbor of San Juan de Nicaragua, or Greytown. All men's minds then were concentrated upon the Nicaragua Canal route, as they were until after the treaty of 1901 was made.

"And thus when the United States turned its attention toward joining these two coasts by a canal through the Isthmus it found Great Britain in possession of the eastern end of the route which men generally believed would be the most available route for the canal. Accordingly, the United States sought a treaty with Great Britain by which Great Britain should renounce the advantage which she had and admit the United States to equal participation with her in the control and the protection of a canal across the Isthmus. From that came the Clayton-Bulwer treaty.

"Let me repeat that this treaty was sought not by England but by the United States. Mr. Clayton, who was Secretary of State at the time, sent our minister to France,

Mr. Rives, to London for the purpose of urging upon Lord Palmerston the making of the treaty. The treaty was made by Great Britain as a concession to the urgent demands of the United States."

* * *

"In the administration of President Taylor, our Secretary of State, Mr. Clayton, opened negotiations with Great Britain with a view to adjusting the differences between the two countries, Mr. Rives, our minister to France, being appointed to submit the views of the United States to Lord Palmerston. Mr. Rives, in his letter to Secretary Clayton of September 25, 1849, describes his interview with Lord Palmerston and states that in pursuance of his instructions he had said to him:

> That the United States, moreover, as one of the principal commercial powers of the world, and the one nearest to the scene of the proposed communication, and holding, besides, a large domain on the western coast of America, had a special, deep and national interest in the free and unobstructed use, in common with other powers, of any channel of intercourse which might be opened from the one sea to the other; * * * *that the United States sought no exclusive privilege or preferential right of any kind in regard to the proposed communication, and their sincere wish, if it should be found practicable, was to see it dedicated to the common use of all nations on the most liberal terms and a footing of perfect equality for all*; * * * *that the United States would not, if they could, obtain any exclusive right or privilege in a great highway which naturally belonged to all mankind.*

* * *

"That was the spirit of the Clayton-Bulwer convention. That was what the United States asked Great Britain to agree upon. That self-denying declaration underlaid and permeated and found expression in the

terms of the Clayton-Bulwer convention. And upon that representation Great Britain in that convention relinquished her coign of vantage which she herself had for the benefit of her great North American empire for the control of the canal across the Isthmus."

That the foregoing representation is correct is confirmed by Henderson in the following taken from his work on American Diplomatic Questions:

"In the correspondence that took place between Mr. Clayton and Messrs. Bancroft and Lawrence, successive American ministers in London, and also in the records of interviews between Mr. Clayton and Mr. Crampton, the British minister in Washington, preparatory to the actual negotiations for a treaty, the attitude of Mr. Clayton and of the Taylor administration toward the question of a Central American Canal is fully and most clearly set forth. The Secretary of State was thoroughly in accord with the popular view that under no circumstances should the United States permit Great Britain or any other power to exercise exclusive control of any isthmian transit route. Upon the other hand, he did not seek for his own country the exclusive control he denied to others, and in assuming his position he followed the universally accepted theory of the complete neutrality of ship canals. The doctrine of international freedom of transit as applying to artificial waterways had been defended by Clay in 1826, and supported by unanimous resolutions of Congress in 1835 and again in 1839. President Polk had not found this doctrine inconsistent with his notions of an aggressive Monroe Doctrine, and his successor, in his annual message to Congress of 1849, had declared that no power should

occupy a position that would enable it hereafter to exercise so controlling an influence over the commerce of the world, or to obstruct a highway which ought to be dedicated to the common use of mankind. The convention concluded with Colombia three years previously contained a special clause calling for a guarantee of neutrality of the proposed isthmian transit route. No other ideas of the political status of an interoceanic ship canal had ever been entertained. * * *

"When it was understood by both Mr. Clayton and Lord Palmerston, as revealed by their correspondence, that neither power actually sought monopoly power over the canal, the way was cleared of the most formidable obstacle to the conclusion of a treaty. * * *

"Having in mind a policy thus broad and liberal, Mr. Clayton entered upon the negotiations of a treaty with Great Britain, desirous of obtaining no exclusive privileges in Central America that should be incompatible with the just rights of other nations; he was intent only on preparing the way for the construction of a great international highway that should be open to the world's commerce upon terms equal to all."

As the "*general principle*" of neutralization established in Article VIII of the Clayton-Bulwer treaty has not been superseded, but is continued "*unimpaired*" in the preamble and in Article IV of the Hay-Pauncefote treaty, we will quote that article in full.

"The Governments of the United States and Great Britain having not only desired, in entering into this convention, to accomplish a particular object, but also to

establish a general principle, they hereby agree to extend their protection, by treaty stipulations, to any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America, and especially to the interoceanic communications, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by the way of Tehuantepec or Panama. In granting, however, their joint protection to any such canals or railways as are by this article specified, it is always understood by the United States and Great Britain that the parties constructing or owning the same shall impose no other charges or conditions of traffic thereupon than the aforesaid Governments shall approve of as just and equitable; and that the same canals or railways, being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other State which is willing to grant thereto such protection as the United States and Great Britain engage to afford."

"*There is the explicit agreement for equality of treatment to the citizens of the United States and to the citizens of Great Britain in any canal, wherever it may be constructed, across the Isthmus. That was the fundamental principle embodied in the treaty of* 1850, and that was the '*general principle*' that the treaty of 1901 left *unimpaired*."

Senator Root continued:

"After the lapse of some thirty years, during the early part of which we were strenuously insisting upon the observance by Great Britain of her obligations under the Clayton-Bulwer treaty and during the latter part of which

we were beginning to be restive under our obligations by reason of that treaty, we undertook to secure a modification of it from Great Britain. In the course of that undertaking there was much discussion and some difference of opinion as to the continued obligations of the treaty. But I think that was finally put at rest by the decision of Secretary Olney in the memorandum upon the subject made by him in the year 1896. In that memorandum he said:"

> Under these circumstances, upon every principle which governs the relation to each other, either of nations or of individuals, the United States is completely estopped from denying that the treaty is in full force and vigor.
>
> If changed conditions now make stipulations, which were once deemed advantageous, either inapplicable or injurious, the true remedy is not in ingenious attempts to deny the existence of the treaty or to explain away its provisions, but in a direct and straightforward application to Great Britain for a reconsideration of the whole matter.

The views of our representative men in the interim of 1850, when the Clayton-Bulwer treaty was adopted, and 1901, when the Hay-Pauncefote treaty was concluded, are of interest as they throw light on what the authors intended to incorporate in the latter treaty. The more important of these views are the following:

Secretary of State Cass said to Great Britain in 1857:

"*The United States, as I have before had occasion to assure your Lordship, demand no exclusive privileges in these passages, but will always exert their influence to secure their free and unrestricted benefits, both in peace and war, to the commerce of the world.*"

Secretary of State Seward in note to Minister Adams, 1862, said:

"This Government has no interest in the matter different from that of other maritime powers. It is willing to interpose its aid in execution of its treaty and further equal benefit of all nations."

In a note to the Colombian minister, January 18, 1869, Secretary Seward expressed himself in the same manner.

Secretary of State Fish:

"A Darien Canal should not be regarded as hostile to a Suez Canal; they will be not so much rivals as joint contributors to the increase of the commerce of the world, and thus mutually advance each other's interests. * * *

"We shall * * * be glad of any movement which shall result in the early decision of the question of the most practicable route and the early commencement and speedy completion of an interoceanic communication, which shall be guaranteed in its perpetual neutralization and dedication to the commerce of all nations, without advantages to one over another of those who guarantee its assured neutrality. * * *

"* * * the benefit of neutral waters at the ends thereof for all classes of vessels entitled to fly their respective flags, with the cargoes on board, on equal terms in every respect as between each other."

Mr. Blaine said in his instructions to Mr. Lowell on June 24, 1881, directing Mr. Lowell to propose to Great Britain the modification of the Clayton-Bulwer treaty:

"The United States recognizes a proper guarantee of neutrality as essential to the construction and successful operation of any highway across the Isthmus of Panama,

and in the last generation every step was taken by this Government that is deemed requisite in the premises. The necessity was foreseen and abundantly provided for long in advance of any possible call for the actual exercise of power. * * * *Nor, in time of peace, does the United States seek to have any exclusive privileges accorded to American ships in respect to precedence or tolls through an interoceanic canal any more than it has sought like privileges for American goods in transit over the Panama Railway, under the exclusive control of an American corporation. The extent of the privileges of American citizens and ships is measurable under the treaty of* 1846 *by those of Colombian citizens and ships. It would be our earnest desire and expectation to see the world's peaceful commerce enjoy the same just, liberal and rational treatment.*"

In another place, Secretary of State Blaine said in his instructions to Mr. Lowell:

"*Nor does the United States seek any exclusive or narrow commercial advantage. It frankly agrees, and will by public proclamation declare at the proper time, in conjunction with the Republic on whose soil the canal may be located, that the same rights and privileges, the same tolls and obligations for the use of the canal, shall apply with absolute impartiality to the merchant marine of every nation on the globe; and equally in time of peace the harmless use of the canal shall be freely granted to the war vessels of other nations.*"

Lord Granville's reply thereto was:

"* * * such communication concerned not merely the United States or the American continent, but, as was recognized by Article VIII of the Clayton-Bulwer treaty,

the whole civilized world, and that England would not oppose or decline any discussion for the purpose of securing on a general international basis its universal and unrestricted use."

President Cleveland, in his annual message of 1885, said:

"The lapse of years has abundantly confirmed the wisdom and foresight of those earlier administrations which, long before the conditions of maritime intercourse were changed and enlarged by the progress of the age, proclaimed the vital need of interoceanic transit across the American Isthmus and *consecrated it in advance to the common use of mankind* by their positive declarations and through the formal obligations of treaties. Toward such realization the efforts of my administration will be applied, ever bearing in mind the principles on which it must rest and which were declared in no uncertain tones by Mr. Cass, who, while Secretary of State in 1858, announced that 'What the United States want in Central America next to the happiness of its people is the security and neutrality of the interoceanic routes which lead through it.'

"* * * Whatever highway may be constructed across the barrier dividing the two greatest maritime areas of the world must be for the world's benefit—a trust for mankind, to be removed from the chance of domination by any single power, nor become a point of invitation for hostilities or a prize for warlike ambition. * * *

"* * * These suggestions may serve to emphasize what I have already said on the score of the necessity of a neutralization of any interoceanic transit; and this can only be accomplished by making the uses of the route open

to all nations and subject to the ambitions and warlike necessities of none."

In the foregoing public declarations, by the solemn asservations of our treaties with Colombia in 1846, with Great Britain in 1850, *we presented to the world the most unequivocal guaranty of disinterested action for the common benefit of mankind and not for our selfish advantage.*

The Hay-Pauncefote treaty must be construed in the light of that historic background and the statements of those who are in a position to vouch for the understanding reached by the two State Departments which drafted the treaty. So construed, our so-called American coastwise trade, from the Atlantic and Gulf of Mexico ports to Pacific ports, and vice versa, must pay the same rate of toll for identical units of traffic as other commerce using the canal.

THE HAY-PAUNCEFOTE TREATY

The intent of the framers of the treaty is naturally of first importance. Neither Mr. Hay nor Lord Pauncefote are now living, but evidences remain. Joseph H. Choate was then American Ambassador to the Court of St. James and had to do with the negotiations.

CHOATE TO SENATOR McCUMBER

"Dear Senator McCumber: I have your letter of March 25, in which you ask me to answer two questions in regard to the negotiation of the Hay-Pauncefote treaty of 1901.

"First. Was it understood by the State Departments of the two countries that the words 'vessels of commerce and war of all nations' included our own vessels?

"Second. Was it understood that these words also included our own vessels engaged in the coastwise trade?

"I answer both of these questions most emphatically in the affirmative. The phrase quoted, 'vessels of commerce and war of all nations,' certainly included our own vessels, and was so understood by our own State Department and by the foreign office of Great Britain. It was understood by the same parties that these words also included our own vessels engaged in the coastwise trade. * * *

"When we came to the negotiation of this last treaty, that of 1901, there was no question that, as between the United States and Great Britain, the canal should be open to the citizens and subjects of both on equal terms, and that it should also be open on like terms to the citizens and subjects of every other State that brought itself within the category prescribed. On that point there was really nothing to discuss, and in the whole course of the negotiations there was never a suggestion on either side that the words 'the vessels of commerce and of war of all nations' meant anything different from the natural and obvious meaning of these words. Such language admitted of the exemption or exception of no particular kind of vessels of commerce and of war of any nation, whether of vessels engaged in foreign trade or coastwise trade, or of steam vessels or sailing vessels, or of black vessels or white vessels, or of iron vessels or wooden vessels. The parties to the negotiation tried to use terms of the meaning of which there could be no doubt or dispute, and they meant what they said and said what they meant.

"It is true that in many treaties there have been

specific exceptions of vessels engaged in the coastwise trade, and it would have been easy to insert it here. But nobody ever suggested that there should or could be such an exception or exemption inserted by implication in this treaty.

* * *

"Of course, I submitted from time to time as the negotiations proceeded the substance of all our negotiations to our Secretary of State in dispatches and private letters, all of which, or copies of which, are, as I believe, on file in the State Department and are doubtless open to the examination of Senators. And Lord Pauncefote in like manner was in frequent communication with Lord Lansdowne or the foreign office of Great Britain, and, of course, submitted all that was said and done between us to them. So when what you refer to in your letter as the State Departments of the two countries approved and adopted the result of our work and exchanged ratifications of the treaty as it stands, they necessarily intended that the words 'the vessels of commerce and of war of all nations' included our own vessels as well as those of Great Britain, and also included our own vessels engaged in the coastwise trade.

"There was no kind of vessel that the words used did not include. I am not at liberty to furnish you with copies of my reports made from time to time to Colonel Hay of the negotiations, but I have carefully examined them to see whether any suggestion was made on either side of the possibility of the exemption or exception of our vessels engaged in the coastwise trade and find absolutely none."

* * *

"It is impossible, in my judgment, to discuss the

question fairly on the true interpretation of the treaty and come to any other conclusion than that the repeal of the exemption clause in the act is necessary out of due regard for our national honor and good faith."

Elsewhere the former ambassador stated:

"As the lips of both these diplomatists and great patriots, who were true to their own countries and each regardful of the rights of the other, are sealed in death, I think that it is proper that I should say what I think both of them, if they were here today, would say—that the clause in the Panama Toll act, exempting coastwise American shipping from the payment of tolls, is in direct violation of the treaty.

"I venture to say that in the whole course of the negotiations of this particular treaty, no claim, no suggestion, was made that there should be any exemption of anybody."

CHOATE TO SENATOR O'GORMAN

"I avail myself of your kind permission to submit anything of mine not already published that might throw light on the pending question.

"I accordingly, with the express permission of the Secretary of State, submit to your committee the inclosed copies of letters written by me to Secretary Hay between August 3 and October 12, 1901, giving step by step the negotiations between Lord Lansdowne and Lord Pauncefote and myself in regard to the Hay-Pauncefote treaty.

"These, if carefully perused, will, I think, be found to confirm my views that the clause in the Panama Canal

act exempting our coastwise shipping from tolls is a clear violation of the treaty."

CHOATE TO HENRY WHITE

"I wrote to the chairman of the committee, Senator O'Gorman, inclosing to him, by the express permission of the Secretary of State, a copy of my letters to Secretary Hay between August 3 and October 12, 1901, the same that you have. To my mind they establish beyond question the intent of the parties engaged in the negotiation, that the treaty should mean exactly what it says, and excludes the possibility of any exemption of any kind of vessels of the United States. Equality between Great Britain and the United States is the constant theme, and especially in my last letter of October 2, 1901, where I speak of Lord Lansdowne's part in the matter, and say, 'He has shown an earnest desire to bring to an amicable settlement, honorable alike to both parties, this long and important controversy between the two nations. In substance, he abrogates the Clayton-Bulwer treaty, gives us an American canal, ours to build as and where we like, to own, control and govern, on the sole condition of its being always neutral and free for the passage of the ships of all nations on equal terms, except that if we get into a war with any nation we can shut its ships out and take care of ourselves.' This was the summing up of our whole two months' negotiation."

Equality between Great Britain and the United States in the use of the canal is the constant theme. It was to be effected by a new treaty "without impairing the '*general principle*' of neutralization" established in Article VIII of the Clayton-Bulwer treaty.

CHOATE DEFINES "GENERAL PRINCIPLE"

"As Article VIII stands in the Clayton-Bulwer treaty it undoubtedly contemplates further treaty stipulations, not 'these' treaty stipulations, in case any other interoceanic route either by land or by water should 'prove to be practicable,' and it proceeds to state what the *general principle* to be applied is to be, viz., no other charges or conditions of traffic therein 'than are just and equitable,' and that said canals or railways, being open to the subjects of Great Britain and the United States on equal terms, shall also be open on like terms to the subjects and citizens of other States, which I believe to be the real general principle (of neutralization, if you choose to call it so) intended to be asserted by this eighth article of the Clayton-Bulwer treaty."—Letter dated August 20, 1901.

In order to be absolutely sure that the "*general principle*" is reaffirmed in the new treaty being drafted, Lord Lansdowne suggested that Article 3A, which follows, be incorporated:

"*In view of the permanent character of this treaty, whereby the general principle established by Article VIII of the Clayton-Bulwer convention is reaffirmed, the high contracting parties hereby declare and agree that the rules laid down in the last preceding article shall, so far as they may be applicable, govern all interoceanic communications across the isthmus which connects North and South America, and that no change of territorial sovereignty, or other change of circumstances, shall affect such general principle or the obligations of the high contracting parties under the present treaty.*"

CHOATE TO SECRETARY HAY

"Lord Lansdowne's object in insisting upon Article 3A is to be able to meet the objectors in Parliament by saying that although they have given up the Clayton-Bulwer treaty, they have saved the '*general principle*,' and have made it immediately effective and binding upon the United States as to all future routes and have dispensed with future 'treaty stipulations' by making it much stronger than it was before. I think his all-sufficient answer is that by giving up the Clayton-Bulwer treaty, which stood in the way of building any canal, he has secured the building of the canal for the benefit of Great Britain at the expense of the United States, relieved Great Britain of all responsibility about it now and forever, and imposed upon the United States stringent rules of neutrality as to Great Britain and all mankind."

CHOATE'S SUBSTITUTE FOR ARTICLE 3A

"Assuming that some such article must be retained, how would this do: In view of the permanent character of this treaty, whereby the general principle established by Article VIII of the Clayton-Bulwer treaty, is reaffirmed the United States hereby declares (and agrees) that it will impose no other charges or conditions of traffic upon any other canal that may be built across the Isthmus (or between the Atlantic and Pacific Oceans) than such as are just and equitable, and that such canals shall be open to the subjects and citizens of the United States and of all other nations on equal terms."

*The foregoing declaration "that such canals shall be open to the subjects and citizens of the United States and of all*

*other nations on equal terms" shows the equality contemplated by the negotiators of the Hay-Pauncefote treaty. It conclusively shows that it was not intended to exempt any of our traffic (coastwise or other) from the payment of its proportionate share of tolls.*

Great Britain insisted on safeguarding the "*general principle*" from impairment even should the United States become sovereign of the Canal Zone. Ambassador Choate, in a letter dated September 21, 1901, writes that Lord Landsowne stated:

"It was quite obvious that we might in the future acquire all the territory on both sides of the canal; that we might then claim that a treaty providing for the neutrality of a canal running through a neutral country could no longer apply to a canal that ran through American territory only; and he again insisted that as Lord Lansdowne had insisted that they must have something to satisfy Parliament and the British public that, in giving up the Clayton-Bulwer treaty, they had retained and reasserted the '*general principle*' principle of it; that the canal should be technically neutral, and should be free to all nations on terms of equality, and especially that in the contingency supposed, of the territory on both sides of the canal becoming ours, the canal, its neutrality, its being free and open to all nations on equal terms, should not be thereby affected; that without securing this, they could not justify the treaty either to Parliament or the public; that the preamble which had already passed the Senate was not enough, although he recognized the full importance of the circumstance of its having so passed.

"I then called his attention to your Article IV, in your

letter, which did seem to me to cover and secure all that he has claimed and insisted on. He said, no, *that it only preserved the principle of neutralization, which it might be insisted on did not include freedom of passage for all nations and equality of terms and that without an explicit provision, which should leave that free from doubts, he could not expect to sustain it before the Parliament and people. I insisted that those ideas were already included in your fourth, i. e., within the words, 'the general principle of neutralization,' especially in the light of that phrase as used in the preamble, where it is 'neutralization established in Article VIII of the Clayton-Bulwer treaty'*; that if not included within that, it certainly was in the phrase, 'obligations of the high contracting parties under this treaty,' for what could be clearer than our obligation by Article III to keep it open and on terms of equality as provided there, and what you meant was that no change of territorial sovereignty should affect *any* of the obligations of the present treaty, including that. He still insisted that it should not be left to the construction of general clauses, but should be explicitly stated. Believing as I do that you had no thought of escaping from the obligations of Article III, Clause 1, in any such contingency as change of territorial sovereignty, and that you had intended it to be included in your language in IV, I wrote down the words, 'or the freedom of passage of the canal to the vessels of commerce and of war of all nations on terms of entire equality and without discrimination, as provided by Article III,' and asked him if those words were added to your IV if it would satisfy him as a substitute for Lord Lansdowne's 3A. He said it would, and with those words added the treaty could, he thought,

be sustained before Parliament and the British public; that he should approve it and he thought Lord Lansdowne could and would, although it would have to be submitted to the Cabinet or to a majority of its members."

Article IV of the Hay-Pauncefote treaty, substituted for the foregoing Article 3A, reads as follows:

"It is agreed that no change of territorial sovereignty or of international relations of the country or countries traversed by the before-mentioned canal shall affect the general principle of neutralization or the obligation of the high contracting parties under the present treaty."

In this connection, Senator Root properly observes:

"The argument is made that this treaty is no longer binding because there has been a change of sovereignty. * * * The correspondence shows that that fourth article of the treaty was put in for the express purpose of preventing any such argument."

CHOATE'S SUMMARY

"I am sure that in this whole matter, since the receipt by him of your new draft, Lord Lansdowne has been most considerate and more than generous. He has shown an earnest desire to bring to an amicable settlement, honorable alike to both parties, this long and important controversy between the two nations. In substance *he abrogates the Clayton-Bulwer treaty*, gives us an American canal, ours to build as and where we like, to own, control and govern, *on the sole condition of its being always neutral and free for the passage of the ships of all nations on equal terms, except that if we get into a war with any nation, we can shut its ships out and take care of ourselves.*"

These excerpts from letters by Ambassador Choate are interesting. They show that the *general principle* of neutralization of the Clayton-Bulwer treaty is continued unimpaired and that that obligates the United States to keep the Panama Canal open to nationals and non-nationals on equal terms. This means that the same tolls must be levied on equal units of traffic through the canal without distinction of flag, and that the American negotiators of the Hay-Pauncefote treaty did not intend to reserve the right of granting free transportation to American shipping—coastwise and foreign.

HENRY WHITE TO SENATOR McCUMBER

"My Dear Senator McCumber: In reply to your letter of 9th instant, which for reasons known to you only reached me three days ago, I send you the following brief account of my connections with the abrogation of the Clayton-Bulwer treaty and with the negotiations which subsequently took place relative to the Hay-Pauncefote treaties.

"In the latter part of December, 1898, being then charge d'affaires to Great Britain, I received instructions from Mr. Hay, who had left the London embassy a few months previously to become Secretary of State, to approach the British Government with a view to ascertaining whether, for reasons set forth in his dispatch, it might not be possible to secure such modifications of the Clayton-Bulwer treaty as would admit of our Government's taking action whereby the construction of an interoceanic canal under its auspices might be accomplished.

"I, of course, lost no time in seeking an interview

with the late Marquis of Salisbury, British Secretary of State for Foreign Affairs and also Prime Minister, with whom, on the twenty-second of December, I had a long and interesting conversation on the subject.

"That same afternoon I cabled to Mr. Hay that there seemed to be no indication of opposition, much less hostility, on the part of the British Government to the construction by us of the proposed canal, and if the latter should be available to the ships of all nations on equal terms I felt that there would be no serious difficulty in effecting an agreement satisfactory to both nations.

"I should be happy to inclose copies of Mr. Secretary Hay's instructions, of my dispatch in reply, and of my cablegram aforesaid, were it not improper for me to do so without the permission of the Department of State. And, indeed, a detailed account of my interview with Lord Salisbury would unduly extend the dimensions of this letter.

"Its substance was, however, that he would be unable to give an official reply to my Government's suggestions until he had given the subject careful consideration and had conferred with the board of trade and other departments of the British Government. But he gave me to understand, confidentially, that in his opinion it was desirable such a canal be constructed; that a work so colossal could only be carried to a successful issue by a great power, and that the United States was that power. Lord Salisbury intimated, furthermore—also in confidence—that the British Government would not, after due consideration of the question, refuse to modify such provisions of the Clayton-Bulwer treaty as stood in the way of our making

the canal, provided the ships of all nations should be guaranteed the use thereof on equal terms—a condition which he strongly emphasized.

"You are aware of the negotiations for a new treaty which were entered upon shortly afterwards by Mr. Hay and Lord Pauncefote, and the result thereof was the first Hay-Pauncefote treaty, to certain features of which the Senate refused its approval.

"The reasons for the Senate's action were for some time misunderstood in Great Britain and created a certain amount of feeling there, which reacted upon this country and caused a certain amount of tension.

"During that period I crossed the ocean several times and had private conversations with a number of the leading men of both countries, with a view to explaining what each really wanted, and to doing away with the misunderstandings which had arisen in that connection. I well remember discussing the questions at issue with several of the leading Senators of that day, of whom none, save Senator Lodge, are now members of that body; and among the many subjects touched upon I can remember no allusion whatever to the use of the canal without payment of tolls by our vessels engaged in the coasting trade.

"Eventually, as you may remember, negotiations were renewed for another treaty to take the place of the one to which the Senate had objected. These negotiations were conducted for the most part in London by Mr. Choate and Lord Pauncefote, who was in England on leave of absence, and whom Lord Lansdowne, the successor of Lord Salisbury as minister of foreign affairs,

had deputed to act in his behalf with regard to the details of the proposed arrangement.

"I was in constant touch, as secretary of the embassy, with these negotiations: each phase of which Mr. Choate was good enough to tell me of. Indeed I was often present during their discussion of the questions at issue, which took place for the most part at the embassy; and I never heard the exemption of our coastwise shipping from the payment of tolls mentioned in any connection.

"I have, furthermore, since the receipt of your letter, looked carefully over the many private and confidential letters which Mr. Hay and I wrote to each other from the time that he became Secretary of State until his death. They deal fully with public affairs, both domestic and international, but among the many references to the canal treaties and other questions pertaining thereto, I can find no allusion whatever to the exemption of our coastwise trading vessels from the payment of tolls.

"Under these circumstances there is but one way in which I can answer the inquiry contained in your letter —'as to the understanding of Mr. Hay and Lord Pauncefote on the question of the use of the canal by vessels engaged wholly in the coastwise trade'—to wit:

"(1) That the exemption of our coastwise shipping from the payment of tolls was never suggested to, nor by, anyone connected with the negotiation of the Hay-Pauncefote treaties in this country or in England;

"(2) That, from the day on which I opened the negotiations with Lord Salisbury for the abrogation of the Clayton-Bulwer treaty until the ratification of the Hay-Pauncefote treaty, the words 'all nations' and 'equal

terms' were understood to refer to the United States as well as to all other nations, by every one of those, whether American or British, who had anything to do with the negotiations whereof the treaty last mentioned was the result."

The views herein expressed are in complete accord with those of Ex-Ambassador Choate to the effect that free transportation to American coastwise shipping is in violation of the Hay-Pauncefote treaty.

HENRY WHITE TO SENATOR SIMMONS

"The *Washington Post* of yesterday quotes former Senator Foraker as saying: 'I have personal knowledge that both Mr. Hay and Mr. Henry White had full knowledge of what the Senate demanded and supposed we were getting,' * * *

"As I am leaving tomorrow for Germany, and may not see you again for some time, I think it well to let you know that I agree with that statement. I not only am under the impression that I knew the reasons which caused the Senate to object to certain provisions of the first Hay-Pauncefote treaty, but I am in sympathy with that body's action. I had no reason, however, to suppose from anything said to me by any Senator or by anyone else that the use of the canal by our vessels engaged in the coasting trade without payment of tolls had any connection therewith.

"Mr. Foraker is one of the Senators referred to in my letter to Senator McCumber and in my statement to the committee, with whom I had conversations after the rejection of the first Hay-Pauncefote treaty. I well

remember an interesting interview which I had with him in 1901 at his house in Washington, and during which we went into what I supposed to be all of the questions at issue between the two Governments; but as far as I can recollect, no allusion was made by either the Senator or me to the exemption of our vessels from the payment of tolls in passing through the Panama Canal."

CHOATE TO SECRETARY HAY

"In this situation, as I do not see anything likely to be required of me that may not be just as well done by Mr. White, *who knows your mind and mine exactly*, and has been fully advised of all that has been done, I propose to keep my long-cherished purpose of sailing on the *Philadelphia* on Saturday, the 12th, unless something to the contrary turns up in the meantime. Quite possibly I may hear before Saturday that Lord Salisbury has approved."

This statement of Ambassador Choate shows that any statement made by Henry White on the tolls question is entitled to great weight. The following paragraph from Representative Stevens' great speech in the House in favor of the tolls-exemption repeal bill appropriately concludes the foregoing by Henry White:

"Only a few weeks ago Hon. Henry White delivered an address in Washington, in which he clearly and strongly affirmed the terms stated in the original note and correspondence, that the intention always existed on the part of all the officials of both Governments that vessels of commerce of both and all nations should always be

treated on terms of entire equality. This would include all trade—foreign and coastwise. *Mr. White has a more intimate knowledge of the actual transactions than any living man, and his statement should be conclusive with fair and just men.*"

"Even more direct and convincing is the evidence of Willis Fletcher Johnson, a journalist of the highest standing, who recalls distinctly a conversation with Secretary Hay in 1904 to this effect:

> I asked Colonel Hay plumply if the treaty meant what it appeared to mean on its face, and whether the phrase, vessels of all nations, was intended to include our own shipping, or was to be interpreted as meaning all other nations. The Secretary smiled, half indulgently, half quizzically, as he replied:
>
> All means all. The treaty was not so long that we could not have made room for the word other if we had understood that it belonged there. All nations means all nations, and the United States is certainly a nation.
>
> That was the understanding between yourself and Lord Pauncefote when you and he made the treaty? I pursued.
>
> It certainly was, he replied. It was the understanding of both Governments, and I have no doubt that the Senate realized that in ratifying the second treaty without such an amendment it was committing us to the principle of giving all friendly nations equal privileges in the canal with ourselves. That is our Golden Rule."—*Harvey.*

The following by Senator Lodge is now apropos:

"Whatever our opinion may be as to the strict legal interpretation of the rules governing the matter of tolls imposed upon vessels passing through the canal, we cannot and we ought not to overlook the understanding of those who negotiated the treaty as to the intent and effect of the rules which they framed. As to the nature of the understanding we have direct testimony. Mr. Henry White,

who first laid before the British Government the desire of the United States to enter into negotiations for the supersession of the Clayton-Bulwer treaty, has stated that Lord Salisbury expressed to him the entire willingness of England to remove all obstacles which the Clayton-Bulwer treaty put in the way of the construction of the canal, and desired only to maintain equality of tolls imposed upon all vessels, including those of the United States. Mr. Choate, who completed the negotiations which resulted in the second Hay-Pauncefote treaty, has publicly stated that the understanding at that time of both parties was the same as that given by Mr. White. The only other American concerned in the actual negotiation of the treaty was the late Mr. Hay, at that time Secretary of State. I know that Mr. Hay's view was the same as that of Mr. Choate and Mr. White. It is therefore clear on the testimony of our three negotiators that the negotiations as they were begun and as they were completed in the second Hay-Pauncefote treaty proceeded on the clear understanding that there was to be no discrimination in the tolls imposed as between the vessels of any nation, including the vessels of the United States."

Senator Root states:

"The Hay-Pauncefote treaty came before the Senate in two forms: First, in the form of an instrument signed on the fifth of February, 1900, which was amended by the Senate; and, second, in the form of an instrument signed on the eighteenth of November, 1901, which continued the greater part of the provisions of the earlier instrument, but somewhat modified or varied the amendments

which had been made by the Senate to that earlier instrument.

"It is really but one process by which the paper sent to the Senate in February, 1900, passed through a course of amendment; first, at the hands of the Senate, and then at the hands of the negotiators between Great Britain and the United States, with the subsequent approval of the Senate. In both the first form and the last of this treaty the preamble provides for preserving the provisions of Article VIII of the Clayton-Bulwer treaty. Both forms provide for the construction of the canal under the auspices of the United States alone instead of its construction under the auspices of both countries. * * *

"The treaty as it was finally agreed to provides that the United States 'adopt, as the basis of such neutralization of such ship canal,' the following rules, substantially as embodied in the convention 'of Constantinople, signed the twenty-ninth of October, 1888,' for the free navigation of the Suez Maritime Canal; that is to say:

"The canal shall be free and open * * * to the vessels of commerce and of war of all nations 'observing these rules on terms of entire equality, so that there shall be no discrimination against any nation or its citizens or subjects in respect to the conditions or charges of traffic, or otherwise.' Such conditions and charges of traffic shall be just and equitable.

* * *

"That rule must, of course, be read in connection with the provision for the preservation of the principle of neutralization established in Article VIII of the Clayton-Bulwer convention. The principle of neutralization

provided for by the eighth article is neutralization upon terms of absolute equality both between the United States and Great Britain and between the United States and all other powers."

The "*general principle*" of neutralization clearly means this:

"It is always understood by the United States and Great Britain that the parties constructing or owning the canal shall impose no other charges or conditions of traffic thereupon than are just and equitable; and that the same canals or railways, being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other State."

In a letter of date August 3, 1901, Lord Lansdowne, with great perseverance, seeks to guard against any possible modification of that "*general principle*" which related to the equality of treatment of the vessels of all nations.

Secretary Hay assured him that:

"The President was not only willing but desirous that '*the general principle*' of neutralization referred to in the preamble of this treaty should be applicable to this canal now intended to be built, notwithstanding any change of sovereignty or of international relations of the territory through which it should pass."

This resulted in agreement on Article IV of the present treaty, namely:

"It is agreed that no change of territorial sovereignty or of the international relations of the country or countries traversed by the before-mentioned canal shall affect the

general principle of neutralization or the obligation of the high contracting parties under the present treaty."

"Thus it will be seen that Great Britain was most insistent that the '*general principle*' of the Clayton-Bulwer treaty, without modification, should be continued, and this country at that time asserted that that was also its purpose that it should not be changed or impaired.

"In a letter from Lord Lansdowne to Lord Pauncefote, ambassador to the United States, of date February 22, 1901, this determination to agree to a modification of the Clayton-Bulwer treaty only upon condition that this '*general principle*' just as it appeared in the Clayton-Bulwer treaty, and without impairment, should be continued everywhere finds expression."

Senator McCumber says:

"We have conclusive evidence of what Mr. Hay, Mr. Choate, Mr. White, Lord Pauncefote, Lord Lansdowne and all those connected with the negotiations understood the treaty to mean. *We have the direct assertion of both Lansdowne and Hay that 'ships of all nations, on terms of equality without discrimination' was intended to mean just the same in the Hay-Pauncefote treaty that it meant in the Clayton-Bulwer treaty, without impairment.*"

We are not at liberty to put a construction upon the Hay-Pauncefote treaty which violates the controlling declaration of absolute equality between the citizens and subjects of Great Britain and the United States, assured to Great Britain in the "*general principle*" found in Article VIII of the Clayton-Bulwer treaty, which "*general principle*" was not superseded but was continued unimpaired in the Hay-Pauncefote treaty.

## VIEWS OF REPRESENTATIVE FREDERICK C. STEVENS OF MINNESOTA AND EXTRACTS FROM THE DAVIS REPORT, PRINTED AS PART OF HIS SPEECH

"The one document in which the facts are best set forth is the report of Senator Cushman K. Davis, of Minnesota, the chairman of the Senate Committee on Foreign Relations, presenting to the Senate the first Hay-Pauncefote treaty. * * * If the time shall come when it will be necessary for our Government to contend before an international tribunal concerning our rights and obligations and duties under these isthmian treaties, this report of Senator Davis will be the best evidence and almost conclusive evidence that by the terms of them the United States is bound to give equal rights to all nations and to all commerce and all citizens in the use of this transoceanic waterway. * * *

"There is a personal aspect to this discussion as to the views and attitude of Senator Davis which I ask leave of the House to discuss and, I think, settle right here. It has been stated in debate here and elsewhere and in various reports, that Senator Davis believed this Hay-Pauncefote treaty allowed discrimination in favor of our coastwise commerce as against other nations. Various sincere and honorable gentlemen have stated from their recollection of his position, that such was his opinion. I had the pleasure of knowing Senator Davis very intimately and for many years, and my recollection is entirely to the contrary. I did not desire to rest on my own memory, so I have reenforced it by consulting those who were most intimate with him, his business, personal and social associates,

and their recollection in every respect agrees with my own. But, of course, this is merely a difference of opinion and recollection among equally sincere and honest men as to a matter which occurred several years ago, so frequently found in the experience of all of us. But fortunately there are records which lift the difference out of the realm of mere recollection and settle it by what Senator Davis in his own writings and in his own record, has stated what he actually did believe. * * * I know you will agree with me from them, that he believed that this waterway should be constructed and operated on terms of treatment of entire equality of the citizens and commerce of all nations.

* * *

That the United States sought no exclusive privilege or preferential right of any kind in regard to the proposed communication, and their sincere wish, if it should be found practical, was to see it dedicated to the common use of all nations on the most liberal terms and a footing of perfect equality for all.

That the United States would not, if they could, obtain any exclusive right or privilege in a great highway which naturally belongs to all mankind.

That while they aim at no exclusive privilege for themselves, they could never consent to see so important a communication fall under the exclusive control of any other great commercial power.

* * *

In the origin of our claim to the right of way for our people and our produce, armies, mails and other property through the canal, we offer to dedicate the canal to the equal use of mankind.

As to neutrality and the exclusive control of the canal and its dedication to universal use, the suggestions that were incorporated in the Clayton-Bulwer treaty came from the United States and were concurred in by Great Britain. In no instance has the Government of the United States intimated an objection to this treaty on account of the features of neutrality, its equal and impartial use by all other nations.

Thus the United States from the beginning, before the Clayton-Bulwer treaty, took the same ground that is reached in the convention of February, 1900, for the universal decree of the neutral, free and innocent use of the canal as a worldly highway, where war should not exist and where the honor of all nations would be a safer protection than fortresses for its security. From that day to this these wise forecasts have been fulfilled, and Europe has adopted in the convention of Constantinople the same great safeguard for the canal that was projected by Mr. Cass in 1857.

No American statesman, speaking with official authority or responsibility, has ever intimated that the United States would attempt to control this canal for the exclusive benefit of our Government or people. They have all, with one accord, declared that the canal was to be neutral ground in time of war and always open on terms of impartial equity to the ships and commerce of the world.

* * *

The United States cannot take an attitude of opposition to the principles of the great act of October 22, 1888, without discrediting the official declarations of our Government for fifty years on the neutrality of an isthmian canal and its equal use by all nations, without discrimination.

To set up the selfish motive of gain by establishing a monopoly of a highway that must derive its income from the patronage of all maritime countries would be unworthy of the United States if we owned the country through which the canal is to be built.

But the location of the canal belongs to other Governments, from whom we must obtain any right to construct a canal on their territory, and it is not unreasonable, if the question was new and was not involved in a subsisting treaty with Great Britain, that she should question the right of even Nicaragua and Costa Rica to grant to our ships of commerce and of war extraordinary privileges of transit through the canal.

It is not reasonable to suppose that Nicaragua and Costa Rica would grant to the United States the exclusive control of a canal through those States on terms less generous to the other maritime nations than those prescribed in the great act of October 22, 1888; or, if we could compel them to give us such advantages over other nations, it would not be creditable to our country to accept them. * * *

> In time of war as in time of peace the commerce of the world will pass through its portals in perfect security, enriching all nations and we of the English-speaking people will either forget that this grand work has ever cost us a day of bitterness; or we will rejoice that our contentions have delayed our progress until the honor has fallen to our grand Republic to number this among our best works for the good of mankind.

"In this report the Senator quoted at some length from the letter of the Secretary of State Clayton to Minister Rives, of France, in the framing of the first Clayton-Bulwer treaty. He evidently desired to emphasize what he considered the most important thoughts in the letter and so has italicized and underscored, evidently with his own hand, what he desired should be especially kept in mind. I will read these paragraphs so you can judge exactly what Senator Davis believed to be of the greatest importance:

> That the United States sought no exclusive privilege or preferential right *of any kind* in regard to the proposed communication, and their sincere wish, if it should be found practicable, *was to see it dedicated to the common use of all nations on the most liberal terms and a footing of perfect equality for all.*
>
> That the United States would not, if they could, *obtain any exclusive right or privilege in a great highway which naturally belonged to all mankind.*
>
> That while they aimed at no exclusive privilege for themselves, they could never consent to see so important a communication fall under the exclusive control of any other great commercial power.

"You will note from these emphasized sentences that Senator Davis believed not only that we did not intend any discriminative treatment in the use of the canal, but he further believed it would be dishonorable to so do.

"When Senator Davis considered this treaty, and his

statement was he had given much consideration to it, he believed that it did not fully protect the rights of the United States, so he prepared what is known as the Davis amendment, as follows:

> Your committee therefore report the following amendment to the pending treaty:
>
> Insert, at the end of Section 5 of Article II, the following:
>
> It is agreed, however, that none of the immediately foregoing conditions and stipulations in sections numbered 1, 2, 3, 4 and 5 of this article shall apply to measures which the United States may find it necessary to take for securing, by its own forces, the defense of the United States and the maintenance of public order.

"The very basis for this amendment, the very foundation for its consideration, was that these paragraphs, 1, 2, 3, 4 and 5, did apply to and bind the United States, and because they did so apply and bind our Government, Senator Davis did not believe they should be construed to prevent the United States doing as it found necessary for its own defense. So he prepared this amendment, based on the contention that paragraph 1 did apply to the United States. Now, here is paragraph 1, which under this amendment did apply to the United States:

> 1. The canal shall be free and open, in time of war as in time of peace, to the vessels of commerce and of war of all nations on terms of entire equality, so that there shall be no discrimination against any nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise.

"This obligation, then, applied to the United States, and under it 'vessels of all nations' must be treated on terms of entire equality and there could be 'no discrimination in favor of any nation, its citizens or its subjects, as to the charges or conditions of traffic, or otherwise.' That

amendment was based on the proposition admitted by everybody that the United States was one of those nations to which this section applied, under which it could not receive any discrimination and must be treated with 'entire equality.'

"That amendment came before the Senate for a vote, and here is its result: Yeas, 65; nays, 17."

Representative Stevens concludes as follows:

"Sixty-five Senators declared that the United States was one of 'all nations,' and could not have any discrimination, and this record cannot be impeached as to its contents and the logical conclusion to be deduced from it."

We will continue the narrative with excerpts from a speech by Senator McCumber. The foregoing excerpts from the Davis report are also found in this speech, and so should be considered a part of these excerpts. The following sentence from the Davis report is a suitable introduction to the long quotation from the Senator's speech:

> The Suez Canal makes no discrimination in its tolls in favor of its stockholders. * * * and, taking its profits or the half of them as our basis of calculation, we will never find it necessary to differentiate our rates of toll in favor of our own people in order to secure a very great profit on the investment.

"There is the foundation upon which we based our belief at that time that we should bind ourselves to accord the same treatment to our vessels as we should accord to the vessels of the world. Before us at that time was a schedule of rates of toll that could be charged, an estimate of the number of vessels, including our vessels engaged in foreign trade and our coastwise vessels, which would make

use of the canal, and upon that we made our estimate of the value of the canal. With that explanation *Senator Davis said we were to treat every nation the same as we treated our own and to rely for our compensation on our investment upon the tolls and upon the special benefit of being brought closer to our sea possessions.*

"Senator Davis declared in that report before the Senate that we furnished the money to build that canal as a venture; that we took the chance of whether it would be profitable or unprofitable; that we were not compelled to divide our profits with the nations of the world if it were profitable, nor to call upon the nations of the world if it did not prove a success. We believed that it would prove a success. The reports that had been made to us upon the basis of one-half of the tolls of the Suez Canal assured us that it would be a success. That calculation took into consideration tolls on our coastwise vessels.

"What could the Senate have understood? What could any Senator have understood by the words:

*We will never find it necessary to differentiate our rates of toll in favor of our own people in order to secure a very great profit on the investment.*

"Let me ask Senators candidly: Did or did not those words mean that this treaty prohibited us from differentiating between our own vessels and the vessels of other nations? If it did not so mean, then what on earth did it mean; and what did Senator Davis mean when he used those words? Can you make a declaration of construction stronger or more emphatic than these words make that construction?

"*No, we all understood; Mr. Hay understood, Lord*

*Pauncefote understood, and the Senate of the United States understood that under the terms of this treaty we could not differentiate between our own ships and the ships of foreign countries.* That declaration was the keynote of the eloquent address that was made by Senator Davis. I cannot pass from his declaration without inserting his final eloquent tribute to this great project:

> In time of war, as in times of peace, the commerce of the world will pass through its portals in perfect security, enriching all the nations, and we of the English-speaking peoples will either forget that this grand work has ever cost us a day of bitterness, or we will rejoice that our contentions have delayed our progress until the honor has fallen to our grand Republic to number this among our best works for the good of mankind.

"*For the good of mankind was our glorious boast in* 1900. *For the special good of ourselves and mankind be damned is the construction we seek to place upon that treaty in* 1914. * * *

"Senator Morgan submitted a minority report; and although he differed with the majority upon certain questions, that eminent scholar and historian agreed entirely with the report of the majority when he said:

> The treaty under consideration is for the avowed purpose of removing any objection that may arise out of the convention of April 19, 1850, commonly called the Clayton-Bulwer treaty, to the construction of such canal under the auspices of the United States, without impairing the general principle of neutralization established in Article VIII of that convention.
>
> That general principle, as it is modified or specially defined in this treaty, is all that is left of the Clayton-Bulwer treaty, as now being in continuing force.

"There was no misunderstanding as to what that general principle was. Says Senator Morgan in his report:

All that is left of this general treaty is the general principle provided in Article VIII of the Clayton-Bulwer treaty. That is, that *the vessels of all nations using the canal should be treated with exact equality, without discrimination in favor of the vessels of any nation.*

"Again, Senator Morgan says:

Then this convention, in Article II, proceeds to define and formulate into an agreement, intended to be world-wide in its operation, 'the general principle of neutralization,' established in Article VIII of the Clayton-Bulwer treaty on the basis of the treaty of Constantinople of October, 1888, relating to the Suez Canal.

*Nothing is given to the United States in Article II of the convention now under consideration, nor is anything denied to us that is not given or denied to all other nations.*

"That was the understanding with those who followed Senator Morgan in his views, and you will see how they explain and fit in with the views of those who opposed Senator Morgan's contention. You will notice how the words used by him in relation to the general principle dovetail with the words used in the treaty itself and in the old Clayton-Bulwer treaty, 'on the basis of the treaty of Constantinople of October, 1888, relating to the Suez Canal,' and *those tolls were the same to every other nation, no matter what the ownership of the canal might be.*

"I have already quoted to you the words in the treaty, that the high contracting parties adopted as the basis of such neutralization the following rules, substantially as embodied in the convention between Great Britain and certain other powers, signed at Constantinople, October 20, 1888, for the free navigation of the Suez maritime canal—that is to say:

The canal shall be free and open in time of war as in time of

peace to the vessels of commerce and of war of all nations, on terms of entire equality, so that there shall be no discrimination against any nation or its citizens or subjects in respect of the conditions or charges of traffic or otherwise.

"*We adopted the Suez Canal regulations, which prohibited favoritism on account of coastwise or other trade.*

"There was inserted in the *Record* last year an article written by Mr. Feuille regarding tolls on the Panama Canal, in which he asserts that the word 'neutralization' used in the Hay-Pauncefote treaty and in the Clayton-Bulwer treaty had reference only to its freedom of use and protection from warlike acts rather than tolls. And his whole argument was based upon that false assumption, because the 'general principle of neutralization' established in Article VIII of the Clayton-Bulwer treaty was not left to any false construction, but the Hay-Pauncefote treaty declares what was intended by those words, and sets forth seven specific propositions that are included in the words 'general principle of neutralization,' the very first of which is the declaration that there shall be no discrimination against any nation or its citizens or subjects in respect of the conditions or charges of traffic or otherwise. *We all know that the rules provided for the operation of the Suez Canal do not exempt the shipping of any owner or stockholder, and when we adopted the Suez regulations we knew we could not claim an exemption as owner.*

"I have presented this much of the proceedings in the Senate at the time of the adoption of the Hay-Pauncefote treaty *to demonstrate beyond any possible contention that the Senate as a whole, those who listened to the debate or took part in it, did comprehend and clearly comprehend that the*

*treaty was being pressed for adoption upon the theory of construction that it bound the United States to claim no privileges for its own vessels of any kind that it did not accord to other vessels.* Thus we have the positive, certain declarations, as set forth in the report, to establish that view beyond contention. But we need not stop there; we have the negative action of the Senate supporting the same view.

"I was present, I think, during all of the debates on the treaty. I cannot be certain that I was in the Senate Chamber every moment, but I do not now recall being absent. It was my first year in the Senate; this was a great question. I took a deep interest in it at that time, and all of the proceedings are impressed upon my mind more indelibly than anything that has happened since. And yet I never heard during all of that debate, either upon the original treaty when it first came before us or upon the modified treaty which was afterwards agreed to by Great Britain, and which came before us the second time, any contention on the floor of the Senate that the construction placed upon it by the authors of the treaty, the committee to which it was referred, were not borne out by its words. With my strong views against the remission of tolls to our vessels, either coastwise or others, I am certain that I never should have voted for that treaty had I supposed that it would have at any time been given a different construction by the Senate or the Congress of the United States. I should have insisted that it be made certain.

"We not only failed to make any such claim, but by a vote of forty-three to twenty-seven we declared against the policy of freeing any of our own vessels from these

tolls. Senator Bard, who represented a constituency whose great cities would be benefited by a provision for free tolls for our coastwise vessels, introduced an amendment for that purpose, as follows:

> Strike out all of Article III and substitute the following:
> Art. III. The United States reserves the right in the regulation and management of the canal to discriminate in respect to the charges of traffic in favor of vessels of its own citizens engaged in the coastwise trade.

"When he proposed that amendment did he believe this agreement gave us the authority without that amendment? * * * Can you imagine that that amendment could come up without being debated or without anything being said about it? Is is possible that the Senate did not debate that question? They did debate it, and they contended that it ought not to be a part of the treaty. That was the reason it was stricken out.

"We were considering a solemn obligation between two of the greatest countries in the world—an obligation between two countries which had made louder proclamations and more persistent assertions in favor of national integrity than any other countries in the world. If we were honest it was incumbent upon us at that time to prevent either of these countries getting into a position in their contractual relations with each other where either they or the other great nations of the world could challenge their sense of national honor. If there was a misunderstanding it was the duty of every Senator, under my code of ethics, to have so declared in the open Senate and to have attempted, so far as he was able to do so, to free the instrument from any uncertainty.

"Suppose I were drafting a private contract with the Senator from Colorado and there were within that contract a certain clause, and he asked me what I understood that clause to mean and I told him what I understood it to mean, and he said, 'That is just what I understood it to mean, and with that understanding we will sign it.' In what position would I be to come around, ten years afterwards, and say, 'Though we agreed as to what the construction should be, nevertheless it is open, according to its real words, to some other construction, and therefore I propose to give it a different construction'?

"Believing that it was certain, Senator Bard introduced his amendment. That amendment was voted down by a vote of forty-three to twenty-seven. By that vote we renounced forever a claim that we could remit these tolls.

"I am well aware that some time after Senator Bard had left the Senate, and in the debates of about a year ago, some Senator introduced a letter from ex-Senator Bard, in which he stated, in substance, as I now remember it, that he thought that there were votes against his amendment on the ground that we had the right to remit the tolls without this amendment. I am very certain that he did not say that anyone ever said so, but that he thought it was voted down on that theory.

"*I cannot believe that there were many Senators who took that position. Certainly none in the open debate, and every Senator knew that it was contrary to the general understanding of the Senate.*

"*With the construction that was placed upon the treaty by those reporting it, it would have seemed to have been our*

*duty, if we had had a different view, to have voted for the Bard amendment so as to make that question certain. We must either say that we did not think so, or else we must admit that we were carrying in our minds a secret conviction that we could violate that provision of our treaty, knowing that the other party to the contract held a different view. Such action on our part would, according to my view, be very far from proper international as well as individual ethics.*

"Every man in the Senate today recognizes not only the clear legal mind of Senator Bacon, but also his absolute candor in debate. He voted for the Bard amendment. He has left in no unmistakable terms what was understood by that vote. While I was discussing that question in the Senate in 1912 Senator Bacon asked permission to interrupt in support of my contention. The *Record* discloses the following:

MR. BACON. If the Senator will permit me, I think he could state it a little stronger than he did when he used the word renounced.

"I have stated that we renounced our claim of a right to eliminate our coastwise trade from the operations of the treaty."

Then he says:

> We were then engaged in the making of a new treaty with Great Britain, and, of course, if Great Britain would have agreed to that arrangement it would have been a legitimate contract and covenant between the two. What the Senate of the United States then did was to decline even to make that demand upon Great Britain. We declined to say that we would contend for that. We not only by that action, in fact, recognized that there was an obligation of that kind under the Clayton-Bulwer treaty, but we declined to contend that that should be surrendered by Great Britain and that a new contract should be made, to which they would not have agreed.

I wish to say, if the Senator will pardon me a moment, in this connection, as I am one of those recorded as voting in favor of the Bard amendment, that my idea at that time was not that any part of the merchant marine of the United States should have free transportation or free right of passage through the canal, but I was standing simply upon the ground that I thought the United States should have the right to control whatever tolls were imposed and discriminate in favor of our own citizens if we saw fit to do so.

"There was an honest statement of what he meant.

I do not wish myself to be considered as being committed by that vote to the principle of free passage for American ships in the canal.

MR. MCCUMBER. I think the vote was clearly a declaration of our intent and purpose not to demand free tolls for our own coastwise trade. That is all that I am citing it for.

MR. BACON. That would be true; and further than that, not to discriminate, that even if we charged tolls we would charge no greater tolls for the ships of foreign countries than for the ships of our own country.

"Mr. Bacon gave the full truth of what the understanding of the Senate was when we voted upon the Bard amendment.

"*And so both affirmatively in debating the treaty and negatively in voting down an amendment to release our coastwise vessels from the payment of tolls have we declared our purpose to maintain the policy of nondiscrimination which has been the continuous policy of this country for nearly a hundred years.*

"Remember that the South American nations have rights here as well as Great Britain and the United States.

They must necessarily have more or less of a coastwise trade.

"In agreeing to the Hay-Pauncefote treaty it was the purpose of the United States to place itself exactly in the same position it would have been in had the canal been constructed by France, by Nicaragua, or any other Central American state. *We claimed no special privileges, because the money represented our investment. It was believed that the tolls charged and the benefits derived specially by the United States would compensate us for the investment.*

"Senator Davis, in his report on the Hay-Pauncefote treaty, declared this its purposes in concise language, and asserted boldly that the United States was to obtain no other privileges than those granted to the nations of the world.

"Back of the claim of right to free our own ships from the payment of tolls and the real basis of the claim is that we paid for the canal with our own money, that we own it and ownership should carry with it the right to do as we please. Yes, we do own it. But we bought the right to construct that canal on foreign territory, and the purchase price for the right to build and operate that canal was that we should forever maintain its neutrality and guarantee equality of treatment to the vessels of all nations. Can we now honorably claim the right and repudiate the consideration?

"The importance and validity of this consideration and our moral duty to fulfill its obligations will be made more apparent as we view the conditions which preceded it. Prior to the Clayton-Bulwer treaty of 1850, two great powers were the sovereigns of all the territory of

North America, except Alaska, north of the Mexican border. The proportionate importance of Canada and the United States was less striking than it is today. The Atlantic and Pacific coast line of Canada was even greater than that of the United States. In addition to this great British possession north of us, that country had her Caribbean possessions, the Bermudas, the Bahamas, British Guiana, British Honduras, and other islands. She also exercised a protectorate over a vast stretch of country on the eastern shore of Central America known as the Mosquito Coast. She was then in possession of the entrance to what was then regarded as the only feasible canal route across the Isthmus. Both the United States and Great Britain were interested in a communication between the two oceans for the benefit of their respective coast lines. The United States beheld Great Britain in possession of that territory which seemed to be the key to an isthmian canal. We feared, and justly feared, the control of such a connecting waterway by any foreign Government; and, therefore, the United States, not Great Britain, asked audience to the end, not that we should obtain an advantage over British rights in any canal that might connect the two oceans, but that Great Britain should not hold an advantage over us. That diplomatic audience was granted at the solicitation of our Government, and we secured just what we asked for and conceded to the other party all the rights which we asked for ourselves. That general idea of neutral rights, equality of rights, has been maintained by both nations, down until after the adoption of the Hay-Pauncefote treaty." * * *

"*The two countries which joined in the Hay-Pauncefote*

*fote convention had for so many years declared their respective policies toward the freedom and impartial use of any ship canal, had so made that policy a part of their political history, that it was thought by both nations that the mere reiteration of that policy was sufficient to insure its continuance without going into the details of all cases which it might cover and which it might not. It was the spirit of the policy that was to govern. The rules of the Suez Canal were known by both nations, and when they declared that the rules governing the Suez Canal should govern the Panama Canal, both felt that they had sufficiently particularized.*"

Did the vote on the Bard amendment reflect the judgment of the then United States Senate? We have already given the convincing argument of Senator McCumber that it did. Searching examination of the *Congressional Record* sustains the Senator's contention. Representative Stevens ably sustains the Senator in the following:

"When the first Hay-Pauncefote treaty was before the Senate for ratification on December 13, 1900, the following proceedings appear on page 15, Senate Document No. 85, Fifty-seventh Congress, first session: 'On the question to agree to the amendment proposed by Mr. Bard, to wit: Strike out Article III and substitute the following: Article III. The United States reserves the right in the regulation and management of the canal to discriminate in respect of the charges of traffic in favor of vessels of its own citizens engaged in the coastwise trade.' It was determined in the negative: Yeas, 27; nays, 43.

"This would also seem to show conclusively that no such a provision was intended to be in the treaty or could

in any way be implied or inferred from its terms, or such an amendment would not be offered. The fact that it was rejected shows the Senate understood such fact, did not want such provision, but desired to preserve and maintain the general principle of 'equality and neutrality,' so clearly set forth in the report of Senator Davis and the memorandum of Secretary Hay accompanying the submission of the treaty, and in this way preserve the uniform and continuous policy as to the canal for more than fifty years. This action of the Senate was so overwhelming that no attempt was made by anyone to offer such an amendment to the second treaty.

"To explain and offset this conclusive evidence that no discrimination was intended by the Senate or could be had for the coastwise trade, the minority, on page 4 of the minority report, inserted a sentence from a private letter of Senator Bard which states:

> When my amendment was under consideration *it was generally conceded* by Senators that even without that specific provision the rules of the treaty would not prevent our Government from treating the canal as part of our coast line and consequently could not be construed as a restriction of our interstate commerce, forbidding the discrimination in charges for tolls in favor of our coastwise trade, and this conviction contributed to the defeat of the amendment.

"To show how much Senator Bard actually knew about that subject in comparison with the other Senators who had a great interest and knowledge of it, it is only necessary to examine his legislative proposition as it appears from the records of the Senate. Senate Document No. 85, Fifty-seventh Congress, first session, page 15, shows the following:

> On the question to agree to the amendment proposed by Mr. Bard, to wit, Strike out Article III and substitute the following: Article III. The United States reserves the right in the regulation and management of the canal to discriminate in respect of the charges of traffic in favor of vessels of its own citizens engaged in coastwise trade.

"The text of the treaty shows Article III of the original treaty to read as follows:

> The contracting parties will immediately upon the exchange of the ratifications of this convention bring it to the notice of the other powers and invite them to adhere to it.

"So that the amendment was not germane as offered, was not in the right place, was not proposed to the right article or section, and, finally, Article III had already been stricken out of the treaty on a motion by Senator Foraker. Senate Document No. 85, page 13, above referred to. Yet this evident misinformation, carelessness and lack of knowledge as to what was actually going on is offered as a basis for reversing the policy and history of our Nation and violating its solemn pledges to the world. The other Senators who now so vigorously recollect are shown to have previously voted that the United States was to be included within the term 'all nations' without any qualification or exception. Their records and their memories do not seem to agree."

Former Senator Fairbanks declares emphatically that:

"The Bard amendment was voted down, after full discussion, not because it was regarded as surplusage, but because in the opinion of a large majority of the Senate it was violative of the spirit of equality, which had been expressed in the treaty."

The following colloquy from the hearings before the Committee on Interoceanic Canals, United States Senate, shows what the then United States Senate considered to be the matter of controlling importance and upon what its attention was focused:

"SENATOR PAGE. I would like to know, if I can, just what the Senator thinks about this question of free tolls for the United States coastwise vessels at the time the second Hay-Pauncefote treaty was being considered. Speaking from your own knowledge, as one of the Committee on Foreign Relations, as well as a member of the Senate, at the time of the passage of the act, can you say without qualification that in your judgment the Hay-Pauncefote treaty would not have been ratified by the Senate if it had believed that the United States could not under that treaty exempt its coastwise vessels from tolls?

"MR. FORAKER. No; I cannot say that without qualification. I can say this, that it is my impression, however, and it was certainly my understanding, that we were making a treaty under which we could do anything we saw fit to do with respect to our own vessels. We could exempt them from tolls, if we wanted to; but *that was not seriously considered at that time* because it was to be an enterprise that would cost a great deal of money, and I think now that, in so far as I can recall, the state of my mind on that subject—in so far as I had any mind on the subject—was that it would be a long time before we would reach a place where we would want to exempt anybody from the payment of toll who wanted to use the canal. But the right of the United States to

pass through any ships she saw fit was unquestionably the prevailing thought in the Senate, according to my understanding. We would not think of charging our battleships anything or our own revenue cutters anything for passing through the canal which we had built with so much money, and in no instance would we think of doing with our own ships anything except what our own best interests might justify us in doing. All other nations were to be on terms of absolute equality with respect to the use of the canal. That was the prevailing thought I had and we did not want any infringing, because we were building it primarily as a war necessity—a measure of defense, and not for the purpose of commerce.

* * *

"SENATOR BRANDEGEE. It has been stated here by several witnesses that one of the principal objects in the construction of the canal was to lower the rates of the transcontinental railroads. What do you say about that?

"MR. FORAKER. I think the first great purpose of the canal was national defense; to transfer our navy back and forth from one side to the other as necessity might require. Our navy was not very large; that is, not large in proportion to our country. It is now much larger. Our country has two ocean fronts, and you had to go around Cape Horn to pass from one to the other. The fact of the *Oregon* having to go around the Horn during the Spanish-American War was the precipitating cause of the action we took.

"SENATOR BRANDEGEE. I agree with you.

"MR. FORAKER. And *national defense was the*

*primary purpose with the majority of Senators.* I cannot say that it was the sole purpose."

"That was not seriously considered at that time" (see page 57) is important. But that that was seriously considered at that time by Great Britain is equally important. "National defense was the primary purpose with the majority of Senators"—see above. Equal and just tolls for all units of traffic using the canal was the primary purpose with Great Britain. Presumably each insisted on getting what it wanted most and the Hay-Pauncefote treaty construed in the light of history shows that each did get what it wanted most.

*We can state this point in greater detail as follows: The United States needed the Panama Canal as a military and naval asset, and therefore sought the modification of the Clayton-Bulwer treaty with that end in view. Great Britain desired the construction of the canal because of its large commercial interests. The one sought ownership and control as a military necessity; the other sought conditions and charges of traffic that would be just and equitable —that would be equal for identical units of traffic using the canal. The paramount object desired by the two contracting parties was different. Final agreement was secured by writing into the Hay-Pauncefote treaty the controlling object of each of the two contracting parties. The United States secured thereby its desired military and naval asset. Great Britain secured thereby the assurance of equality in tolls between our nationals and its own subjects.*

Representative Stevens throws light on the construction of treaties in the following:

"One of the most important considerations in the construction of Section 1, Article III as to 'equality of treatment without discrimination,' and as to whether an exception concerning our coastwise vessels can be implied from it, must be from the language of the preamble of the treaty. This preamble is in terms:

> The United States of America and His Majesty Edward the Seventh, of the United Kingdom of Great Britain and Ireland, etc., being desirous to facilitate the construction of a ship canal to connect the Atlantic and Pacific Oceans by whatever route may be considered expedient, and to that end to remove any objection which may arise out of the convention of the nineteenth of April, 1850, commonly called the Clayton-Bulwer treaty, to the construction of such canal under the auspices of the Government of the United States, without impairing the "*general principle*" of neutralization established in Article VIII of that convention. * * *

"It is a fundamental principle of construction of all documents that such a preamble shows first of all the reason for the making and existence of the agreement, document, or act; and secondly, that the language of the document, treaty, and so forth, should be so construed, if reasonably possible, to give effect to such purpose. (Moore, 5 Dig. Int. Law, p. 249.)

"Thus it is important to ascertain what is the '*general principle*' of neutralization established in Article VIII of the Clayton-Bulwer treaty, which must not be impaired by this treaty. This Article VIII has been previously set forth in terms, so need not here be repeated.

"It will be noted that the general principle is established and embraces, *first, protection to the canal*; *second, that the charges therein shall be just and equitable*; *and third, that it shall be open to the citizens and subjects of the*

*United States and Great Britain on equal terms, and also shall be open on like terms to the citizens and subjects of other nations* willing to grant the same protection to the canal as do Great Britain and the United States. *Subsequently, by agreement in the second treaty, the protection of the canal was confided and confined to the United States, without changing the other provisions of the 'general principle.'*

* * *

"Secretary of State Olney, in 1896, in a memorandum on the Clayton-Bulwer treaty, said (Moore, 3 Dig. Int. Law, p. 207):

> As Article VIII expressly declares, the contracting parties by the convention desired not only to accomplish a particular object, but to establish a general principle. This general principle is manifested by the provisions of the first seven articles, and is that the interoceanic routes there specified should, under the sovereignty of the States traversed by them, be neutral and free to all nations alike.

"The preceding articles of the treaty, which show the intent and purpose of the general principle, have already been described, and all together conclusively show that the term *'general principles'* can bear no other construction with reference to the Hay-Pauncefote treaty than requiring *'equality of treatment of all vessels, foreign and domestic, coastwise and all,'* and that there must be no discrimination as to charges or conditions of traffic of any nation, and that all charges and conditions should be just and equitable, must be an integral condition for neutralization of the canal.

* * *

"These are the same conditions set forth in Article III of the Hay-Pauncefote treaty, and on their face there

can be no possible exception of our commerce. Not only the language of the section but the very reason for the existence of the language forbids such exception.

* * *

"This has been the invariable construction of the treaties and of the policy of the United States from the beginning down to the present. There should further be noted the action of our Government in carrying out the '*general principle*,' thus construed and defined in these treaties. President Roosevelt in his message of December 4, 1901, transmitting to the Senate the Hay-Pauncefote treaty, which was ratified and is now in effect, described it as a convention without impairing the general principle of neutralization established in Article VIII of the Clayton-Bulwer treaty. Further, on the twenty-second day of February, 1902, in the proclamation making such treaty effective, President Roosevelt, in the preamble to it, again sets forth the existence of the '*general principle*' of neutralization which was to be maintained by such treaty, and in the final statement of the proclamation is found this clause, 'to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens therof.'

"Thus the United States Government at once in the proper way notified the world in the exact language of the treaty itself of its intention to observe and fulfill every article and clause thereof in the exact terms of the treaty itself.

SUEZ CANAL RULES

"It is an elementary rule in the construction of treaties and statutes that where the provision in question has been

copied from those of another nation or state, where such provision has received a careful construction, that such construction would be of great value in considering the proper construction of the borrowed section. In this instance Article III of the treaty provides 'that the United States adopts as a basis of the neutralization of such ship canal the following rules, substantially as embodied in the convention of Constantinople, signed October 28, 1888, for the free navigation of the Suez Canal. That is to say,' then follow the six sections laying down the rules of neutralization and equality which shall apply to the Panama Canal.

"The article in the Suez convention relating to charges and tolls is as follows:

> Article X. The high contracting parties, by application of the principle of equality as regards the free use of the canal (a principle which forms one of the bases of the present treaty), agree that none of them shall endeavor to obtain, with respect to the canal, territorial or commercial advantage or privileges in any international arrangements which may be concluded. * * *

"Other sections contain substantially the same provisions as in the other sections of Article III of the Hay-Pauncefote treaty.

"These sections have always been construed to forbid any discrimination in favor of or against the coastwise vessels or other trade of any of the contracting nations; and though Great Britain really has the controlling voice in the management of the canal, and France is the headquarters of the management, yet their vessels pay and are treated exactly the same as all others. * * * "

This shows that the United States as owner of the Panama Canal is not entitled to grant free transportation

through it to its coastwise shipping as a result of such ownership.

The following from Senator Burton's speech clinches the argument against the right of the United States to exempt the shipping of any of its nationals from the payment of the same tolls imposed on non-nationals:

"President Roosevelt, in submitting the second Hay-Pauncefote treaty, said:

> It specially provides that the United States alone shall do the work of building and assume the responsibility of safeguarding the canal and shall regulate its neutral use by all nations on terms of equality without the guaranty of interference of any outside nation from any quarter.

"Again, he says, on January 4, 1904, in a special message:

> Under the Hay-Pauncefote treaty it was explicitly provided that the United States should control, police and protect the canal which was to be built, *keeping it open for the vessels of all nations on equal terms.* The United States thus assumes the position of guarantor of the canal and of its peaceful use by all the world.

"In a note by Secretary Hay on the following day, he states:

> The Clayton-Bulwer treaty was conceived to form an obstacle, and the British Government therefore agreed to abrogate it, the United States only promising in return to protect the canal and keep it open on equal terms to all nations, *in accordance with our traditional policy.*

"Aside from correspondence and declarations relating to the proposed Isthmian canal, two negotiations remain very nearly contemporaneous with the date of the Hay-Pauncefote treaty, both of which are in entire accordance

with our settled national policy, but which in their bearing upon the interpretation of the Hay-Pauncefote treaty far outweigh all the preceding, not only because of the similarity in the questions involved but because of the further fact that they are so nearly contemporaneous with the negotiation of the treaty. The facts pertaining to them must have been clearly in mind when the treaty was framed They are:

"Our negotiations in relation to the so-called open door in China in 1899 and succeeding years. [The other—the Welland Canal controversy—anon.] Great Britain, Germany, France, Russia and Japan were the countries regarded as possessing, though in unequal degrees, an advantageous position in China.

* * *

"Mr. Hay accordingly laid down certain principles which he desired should be formally declared by the Russian Empire and by all the great powers interested in China. Of these principles he said, they 'will be eminently beneficial to the commercial interests of the whole world':

* * *

> Third, that it will levy no higher harbor dues on vessels of another nationality frequenting any port in such "sphere" than shall be levied on vessels of its own nationality, and no higher railroad charges over lines built, controlled or operated within its "sphere" on merchandise belonging to citizens or subjects of other nationalities transported through such "sphere" than shall be levied on similar merchandise belonging to its own nationals transported over equal distances.

"Special attention is called to the third of the principles, the recognition of which was requested. *It included a demand that no higher railroad charges over lines built,*

*controlled or operated within its sphere on merchandise belonging to the citizens or subjects of other nationalities should be levied than on similar merchandise belonging to its own nationals.*

* * *

"*We thus demanded* equal use of the ports controlled by these various nations, equal privileges in trade, and, what is most significant of all, *equal railroad rates upon railways constructed by Russia at great expense and extending into the interior through Chinese territory to a connection with railways within her own domains.* * * *

"Not only was the treaty in accordance with our traditional policy, but negotiations had been initiated contemporaneously with the negotiations with the various nations in China for an 'open door,' and it would have been the height of inconsistency to have made the demand for equality of treatment in China and to have denied it in a treaty relating to an Isthmian canal.

"Our record was so uniform and unbroken that we could have taken no other ground. The attempt by John Adams and Franklin and Jay in the years 1782 and 1783 pointed a new way as emphatically and as decisively as any of the great principles which lie at the foundation of our Government."

Negotiations were begun with the clear understanding on the part of both Great Britain and the United States that the ships of all nations would be allowed the use of the canal on equal terms.

Henry White states the results of the first conference in the following:

"A brief, informal conversation followed, during which Lord Salisbury said nothing to leave me to suppose that he is unfavorably disposed—much less hostile—to the construction of the canal under our auspices, *provided that it is open to the ships of all countries on equal terms.*"

"*Open to the ships of all countries on equal terms*" was understood to mean:

"It is always understood by the United States and Great Britain that the parties constructing or owning the same shall impose no other charges or conditions of traffic thereupon than are just and equitable; and that the same canals or railways, being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other State."

Negotiations were closed with this understanding according to Ambassador Choate:

"I wrote to the chairman of the committee, Senator O'Gorman, inclosing to him, by the express permission of the Secretary of State, a copy of my letters to Secretary Hay between August 3 and October 12, 1901, the same that you have. *To my mind they establish beyond question the intent of the parties engaged in the negotiation that the treaty should mean exactly what it says, and excludes the possibility of any exemption of any kind of vessels of the United States.* Equality between Great Britain and the United States is the constant theme, and especially in my last letter of October 2, 1901, where I speak of Lord Lansdowne's part in the matter, and say 'He has shown an earnest desire to bring to an amicable settlement, honorable alike to both parties, this long and

important controversy between the two nations. In substance, he abrogates the Clayton-Bulwer treaty, gives us an American canal, ours to build as and where we like, to own, control, and govern, on the sole condition of its being always neutral and free for the passage of the ships of all nations on equal terms, except that if we get into a war with any nation, we can shut its ships out and take care of ourselves.'

"This was the summing up of our whole two months' negotiation."

Closed with the understanding embodied in the following, according to Secretary of State John Hay—*the man who knew:*

"All means all. The treaty was not so long that we could not have made room for the word 'other' if we had understood that it belonged there. 'All nations' means all nations, and the United States is certainly a nation."

"That was the understanding between yourself and Lord Pauncefote when you and he made the treaty?" I pursued.

"It certainly was," he replied. "It was the understanding of both Governments, and I have no doubt that the Senate realized that in ratifying the second treaty without such an amendment it was committing us to the principle of giving all friendly nations equal privileges in the canal with ourselves. That is our golden rule."

Senator McCumber properly says:

"I cannot imagine how any Senator in this chamber who will read the history that precedes the Clayton-Bulwer treaty, who will read the Clayton-Bulwer treaty

following our declarations, and who will then read the declarations of this Government in all its statements from that time down to 1901, can for one moment question our great national policy of equality of treatment of all vessels which might use that canal. Then, when we come down to the conditions, the views of both Governments at the time we entered into the great obligation known as the Hay-Pauncefote treaty, when we stop and read the declaration of the British press and the declaration of the American press that coincide exactly, showing that the views of the two nations have never changed in the slightest degree, when we follow that up with the declaration of our negotiators * * * in which they declare over and over again that the general principles of neutrality enunciated in the Clayton-Bulwer treaty should not be violated or impaired by this Government, and when we follow that up by the declarations that are shown in the letters [of Ambassador Choate and Henry White] * * * I cannot conceive the possibility of any man's mind being so everlastingly prejudiced that he will close it to all this clear, unmistakable evidence of what they and we all understood this treaty to mean, and insist that notwithstanding all this we can read the treaty another way. Our duty is to read that treaty the way the parties understood it to mean when they signed it."

The matter, as indicated in the foregoing by Senator McCumber, was so fully settled by those who actually negotiated the Hay-Pauncefote treaty and the treaty with Panama—Hay-Bunau-Varilla—and knew the intent of the parties that the great English and American

common law doctrine of *stare decisis* as to the rights of the parties should apply if the doctrine could be enforced in view of the original partnerships and vested rights. We are plainly obligated to operate the Panama Canal "*for the benefit of mankind on equal terms to all.*"

## CHAPTER II

### *Legal and Moral Aspects of Tolls-Exemption*

Citizens of the United States should, as we see it, brush aside all personal, political and local considerations and approach the problem on a high moral plane and in a judicial frame of mind. We should turn a deaf ear to all race or religious appeals, and turn an equally deaf ear to the blair of party trumpets, however loud and thrilling, just as a judge should when he puts on his judicial robes and ascends the bench to decide a case of law on contracts, regardless of his personal preference, feelings or other considerations not a part of the record.

Careful examination of the record of the issue which has been made up; an issue which was begun, as far as the governing principles are concerned, as far back as 1826, which record is on file in the archives of all civilized Governments and of all large libraries of the world, constrained us to urge the repeal of this ill-considered act of Congress.

Before we, in that manner, go down not merely in American history, but in the history of the world, let us pause, examine the record again and reason together without race or party prejudice. Let us pause, and, with that immutable record before us, think again before we continue on a course with such far-reaching consequences.

So far as party platforms are concerned we will not

discuss them. They have no standing or authority in an international dispute of this character.

When the party platforms were adopted in 1912, this question was not an international, or national, issue. Only those people who took official part in formulating, negotiating and ratifying the treaties, and passing this act of Congress, were familiar with the terms of the treaties, and the intent of the high contracting parties as shown by contemporaneous acts and previous representations.

This is the first time the matter has ever confronted the American people as a live issue. The protest of a great and friendly nation made it impossible, in any degree of reasonableness or honor, to await the outcome of any kind of available national referendum.

Besides, it is not a national or domestic matter, but a diplomatic and international question of law and honor, based upon a record made up—a completed record. The unanimous vote of the American electorate, in favor of the act, and against the position of the President, would not change the facts, and the plain rights of the parties in connection with the international agreement under which the Panama Canal Zone was leased by the United States, the canal was built and must be operated, unless the agreement between the contracting powers is changed.

The Constitution of the United States is supreme and not a party platform if there is a conflict.

Article VI, Section 2 of the United States Constitution:

"This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made, under the authority of the

United States, shall be the supreme law of the land, and the judges in any State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Members of Congress take an oath to uphold the Constitution of the United States on entering upon the duties of the office. That is more binding on them than a party platform. There ought to be no conflict between party platform and Constitution. If there is, the party platform should be revised at the earliest opportunity. Action should be in harmony with the Constitution.

We cannot understand the reasoning and the sense of proportion by which men with apparently the best and most honorable intentions, have placed adherence to party planks higher than a nation's solemn international obligations.

As stated in the preface to this work many entirely sincere persons have been led astray on the subject of Panama Canal tolls-exemption by the popular assumption of an entirely false promise as to the record title to the strip of land called the Canal Zone. Article XIV of the treaty with Panama states:

"As the price or compensation for the rights, powers and privileges granted in this convention by the Republic of Panama to the United States [notice, *sovereignty* is not mentioned] the Government of the United States agrees to pay $10,000,000 in gold coin of the United States on the exchange of the ratification of this convention and also an annual payment *during the life of this convention*, of $250,000 in like gold coin, beginning nine years after the date aforesaid."

It expressly states that only rights are granted and that during the life of the convention. These rights are granted for a price. The main reason for the attitude of most people, other than those interested in getting a discrimination in favor of coastwise shipping, is an impression, created by newspaper editorials, that the United States owns the Canal Zone, and that like the Erie and other canals it runs through our territory.

That phase of the matter is well covered in an editorial of a New York afternoon paper dated March 27, headed the "Panama Lease." It expresses the situation on that subject as shown by the record.

"When the canal strip was acquired it was not contended that this country had acquired sovereignty. The matter is discussed in President Roosevelt's message of January 4, 1904, written after the Panama revolution and the negotiation of the treaty with the new republic. The act of Congress of June 28, 1902, covering the preliminaries for the building of the canal, authorized the President to acquire from Colombia 'perpetual control' of a strip of land six miles wide over which this country, under the lease, was to have governmental jurisdiction. The Hay-Herran treaty negotiated with Colombia, whose rejection by Colombia precipitated the Panama revolution, so provided in practically the same language as that contained in the later treaty with Panama. In the message of January 4, 1901, Mr. Roosevelt discussed whether the Hay-Herran treaty conferred on us sovereign rights and whether Colombia was warranted in rejecting the treaty on this account. Says the message:

" 'The treaty, instead of requiring a cession of

Colombia's sovereignty over the canal strip, expressed, acknowledged, confirmed and preserved her sovereignty over it.'

"It was never asserted until lately that the canal is exclusively our property. *It was proclaimed over and over again that it was to be a neutral waterway for the benefit of the commerce of the world, with only so much control over it by us as was necessary to enable us to guarantee its neutrality and to provide properly for its guardianship and operation.*"

Senator McCumber says:

"When we build a canal in the United States we do not make a contract with any other nation. The fact that we did make a contract with another nation concerning the Panama Canal presupposes that we did not have a free hand to do just as we pleased, but that we were compelled to secure certain rights, and that to secure those rights we naturally were compelled to bind ourselves to certain conditions to do something on our part. And what we want to arrive at is what we agreed to do. * * *

"The remission of tolls to our coastwise vessels, or to any other vessels belonging to the citizens of the United States or of any other country, is a clear violation of our international agreement. When the Senate of the United States voted in favor of the Hay-Pauncefote treaty it did so on the clear and unequivocal understanding that this treaty on which it was voting, irrespective of any and all previous utterances and declarations of the Government, and irrespective of whether the old Clayton-Bulwer treaty was alive or dead, did bind this country to treat all vessels

of the world on an equality with our own vessels. I will not say that there might not have been some individual Senator who might have carried in the secret chambers of his mind a conviction that he could at some future time, if called upon, give the treaty a different construction. What I do say is that if he had any such conviction he did not publicly disclose it in the debates, and he knew that the Senate as a body and the Committee on Foreign Relations which reported the treaty, as clearly shown in its reports, did understand that the treaty did bind us to this equality of treatment. And while there was a vigorous minority report by Senator Morgan, that minority report took no issue, but confirmed the construction placed upon the treaty by the majority.

"With these two reports before the Senate it would be a slander upon both its judgment and its sense of integrity to say that while without a word of protest it voted for this treaty that it nevertheless so voted with a secret conviction that these committee reports, which gave a certain construction to the Hay-Pauncefote treaty—a construction in harmony with the views of Secretary Hay and Lord Pauncefote—could at some future time be repudiated.

"I put this question squarely up to Senators on both sides of this Chamber: Admitting that the treaty by its terms does not preclude a construction authorizing us to discriminate in favor of our own vessels, but that both countries understood that it did so, that both Mr. Hay and Lord Pauncefote understood that it did preclude us from discriminating in favor of our vessels, and that the Senate when it confirmed the treaty knew that the parties under-

stood it that way, and the Senate as a whole understood it the same way, would you then declare that, notwithstanding this mutual understanding, we should give it a construction contrary to what was then understood?

"Or, putting it in another form, if the contract itself is uncertain as to its intent, but the parties to the contract were agreed as to its intent when they executed it, should or should not each party be morally bound to give the contract a construction in harmony with their intent when they executed it?

* * *

"I shall omit all the earlier history pertaining to this question, every word of which gives added strength to my contention, and immediately proceed to the conditions surrounding the negotiations of the first and second Hay-Pauncefote treaties, reaching back of that only momentarily to draw from the old Clayton-Bulwer treaty of 1850 only a paragraph always referred to thereafter as the '*general principle*,' and which was the only part of that old agreement retained, in any form, in the new. That '*general principle*' was expressed in these words:

> And the same canals or railways being open to the citizens and subjects of the United States and Great Britain on equal terms, shall be open on like terms to the citizens and subjects of every other State—

"This is our starting point. There is the '*general principle*'; and while it was reiterated a thousand times thereafter, it has never been reiterated in the sense that it has been modified.

"We start right here from this '*general principle*,' which guaranteed equality of treatment to not only vessels

of the United States and Great Britain, but also to vessels of all other nations. Now, that '*general principle*' was asserted and re-asserted by both parties again and again down to the adoption of the second Hay-Pauncefote treaty. Up to that time it meant equality of treatment of all vessels, including those of the United States. If it is now to have another meaning, that other meaning must be found either in an expressed declaration to that effect, or in a clear inference because of change from individual to Government ownership and control of the canal.

"*At that time in the discussions in the press of our own country we took the position that the interest upon the investment and the operating expenses should be borne by all vessels passing through that canal. All our estimates for receipts in tolls to repay interest included all our vessels, coastwise and otherwise. That was what we understood on this side of the ocean.*

* * *

"In closing, I cannot but feel, and deeply feel, that this is not a mere question of dollars and cents. The matter of the payment of these tolls is a bagatelle, but we cannot measure national integrity in dollars and cents. We can throw our dollars to the winds, but we cannot throw national character to the winds. The President of the United States has taken a lofty stand in this case, and no matter whether we be Democrats or Republicans, we ought to stand by him in his effort to uphold the national integrity of this Government in the eyes of the whole world."

We will now use excerpts from the scholarly speech of Representative Stevens:

"It seems to me that the difference in the discussion between the two sides of this question is fundamental in this particular. Those of us who contend for equal tolls without discrimination as to any nation believe that the principal basis in the settlement of this question should be international, and that domestic considerations should be secondary. Those who differ with us believe that domestic considerations should be primary and that international questions should be secondary. * * *

"The geography of the world clearly shows its international importance. The Panama Canal is a strait connecting the two greatest oceans of the world. Upon these oceans face practically every great civilized and commercial nation of the world. Upon these oceans has been and will be carried the great mass of the water-borne commerce of the world. Upon these oceans, as we do, face nine nations, with more or less coastwise commerce between their coasts. Upon these oceans front the mother and the colonial possessions of the most important nations in the world, and upon these oceans and passing through that canal will be an increasing intercourse, which will change, more or less—probably more, as the years go on—the destiny, political, commercial and social, of all of these great peoples and countries. We must realize, then, that all of these peoples and all interests of all nations are greatly interested in the management and operation of this canal. They are interested in their own right, and they have natural, God-given rights in this great connecting waterway, which must be considered by any just people to whom may be intrusted the task of administering it.

"I speak of natural rights in connection with the use of this canal with reason and advertently, because our country from the beginning of its history has insisted on the natural rights of our people and of our commerce in the use of every connecting waterway in the world, wherever it has seemed necessary for our people or commerce to properly go. From the beginning of our Government, since the time when John Jay asserted that right on behalf of this country in the British treaty, I think of 1794, and President Jefferson sent our heroic little Navy against the Barbary pirates to assert the right of a free and open sea with equality of treatment, down through the discussion with Denmark of the right to levy sound dues at the entrance of the Baltic, the discussion of natural and international rights in the Straits of Magellan and the rights of the nations in the Pacific, north and south everywhere, every administration of every political party has insisted that American citizens and American commerce should have equal rights with every other nation everywhere and at all times. That has been the true American policy, the historic policy of our country.

"The International Parliamentary Union has collected and published a very elaborate document upon the subject of international rights in maritime canals. It contains a list of about forty great straits and connecting waterways and canals in the world, in which there are natural rights of an international character.

"In many of these the United States has asserted its right of equal treatment, and wherever any question has arisen, our Government has insisted upon its right of equal treatment for its commerce and its citizens

in every one of those waterways. The first time there has been any departure by our country from this invariable rule as to equal treatment in the use of any of this class of waterways, was the enactment of this Panama bill of two years ago.

* * *

"There is another phase of our history that should be remembered and to which I especially wish to call the attention of my friends from New York and California. In 1846 we made a treaty with New Granada concerning communications across the Isthmus of Panama, which covered all kinds of transportation. That treaty provided that our people and our commerce should be treated on equal terms with the people and the commerce of New Granada. You will recall that was about the time of the discovery of gold fields in California. Thousands of our citizens and thousands of tons of our commerce passed over that great highway. The Governments of Panama and Colombia sought to discriminate in numberless ways against our citizens and commerce. They passed and exercised various acts of discrimination against our people. Our people bitterly complained. The records of the State Department contain hundreds of protests, hundreds of complaints, from the citizens of California and from the citizens of New York against the Governments of Panama and New Granada. Our Presidents, our Secretaries of State, our ministers, protested, sometimes effectively, sometimes in vain.

* * *

"We protested, I say. Twice warships were sent to enforce equality of treatment, once by a Democratic

administration and once by a Republican administration, and we forced New Granada and we forced little Colombia and little Panama to yield to our citizens and to our commerce equality of treatment in the passage of that Isthmus.

"Now, that same treaty is in force. Secretary Knox officially notified the Committee on Interstate and Foreign Commerce that that same treaty is in force and effect right now. Secretary Root and Secretary Hay based their negotiations with Colombia on the fact that that treaty is in force. * * *

"We did require Colombia and New Granada to yield to us equality of treatment. While that same treaty is now in force, we propose to continue a law and adopt a policy which shall forbid equality of treatment by us to them. By the law now on the books we propose to exercise the same sort of discrimination which we sent warships and cannon to forbid them making against us. I leave it to you to decide as to the honesty and sincerity of that nation and that people who, after they know the facts, will insist upon that sort of discrimination and inconsistency. * * *

"Now, it is argued, and strongly, that because we have spent $400,000,000 in the construction of this canal and must defend and maintain it that it is ours and we ought to have the right to do with it as we please, and prefer and discriminate in favor of our own people. Consider what that argument really means. We went upon that great world highway between the oceans, knowing well the rights and interests of all nations in it. We knew and loudly claimed for many years that this was a great inter-

national highway and that we should insist upon our rights of equal treatment in its use. We said so for fifty years before we undertook its construction. When we actually undertook the construction of that highway, we entered into an engagement with the nation which owned the land over which it passed, and promised that it should continue to be a highway for equal use of all nations. We said so in pledges to the world; we said so in express terms to the nation which granted us the land for the highway. In the very instrument of grant, the treaty with Panama, by which the Canal Zone was ceded to us for use as a canal, among other things two were especially mentioned by Panama, one that her own public vessels should use the canal free from tolls, and second, that all vessels of all nations should be equally treated, and that there should be no discrimination to or for any traffic of any nation. These are express conditions of the grant by which we acquired the Canal Zone. Shall we now repudiate these pledges and these promises as to this waterway?

"Senator Davis, in his great report, well said that—

> Our Government or our people will furnish the money to build the canal presents the single question whether it is profitable to do so. If the canal, as property, is worth more than its cost we are not called on to divide the profits with other nations. If it is worth less and we are compelled by national necessities to build the canal, we have no right to call on other nations to make up the loss to us. In any view it is a venture that we will enter upon if it is to our interest, and if it is otherwise we will withdraw from its further considerations.
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> * * *

"When we commenced that great undertaking we knew what we were about to do. We went into it with our eyes wide open, and told the world, and especially our

neighbors, of our intention; and now that it is finished, do the American people mean to say that because we want it, because we are big and it is big, we will do as we please regardless of the promises in the past?

* * *

"Article II provides three methods for constructing the canal: First, by the United States itself, at its own cost; second, by individuals or corporations whom the United States might assist by loan or gift of money; third, by individuals or corporations with whom the United States may co-operate through subscription to or purchase of stock or shares. Article II is as follows:

> Article II. It is agreed that the canal may be constructed under the auspices of the Government of the United States, either directly at its own cost or by gift or loan of money to individuals or corporations or through subscription to or purchase of stock or shares, and that, subject to the provisions of the present treaty, the said Government shall have and enjoy all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal.

"Necessarily the rules as to the use of the canal prescribed in Section 1, Article III, as to equality, must apply in the same way to all of these methods of construction and to whichever one of them may be adopted. There is nothing in the treaty indicating any different treatment of American vessels, whether the canal be constructed by private corporations or by the Government itself. This being true, with no provision in the treaty granting any preferential right or privilege, but, on the contrary, the strongest kind of language forbidding it, it must be difficult for any impartial person to fairly contend that a corporation constructing the canal at its

own expense and operating it for a profit, as the Suez Canal was constructed and is operated, can, under these circumstances and conditions, be compelled to give free passage to a large class of vessels possibly yielding a larger profit to their owners, owned by other corporations or interests not named, described, or excepted anywhere in the treaty.

"It is submitted that under this treaty any corporation constructing and operating the canal under this provision would not be compelled to relinquish, without consideration, any of its legitimate revenues to another corporation owning and operating American ships in the coastwise trade.

"Exactly the same rule must apply to the construction and operation by the United States itself as by a private corporation doing the same thing, because the same language and the same authority and rules apply to both. There can be no exception in one case unless it can also be an exception in the other.

"It can hardly be argued that the United States might exact as a condition of any grant, aid, or subscription that there should be a preference or discrimination to the vessels of commerce of its citizens, because that very thing is expressly forbidden by the broad terms of Section 1, Article III, prohibiting any such exception or condition.

"Any other stockholder or guarantor could have as much right to exact his own private conditions for his own private advantage, with the result that the enterprise would face ruin from the start. The treaty gives the United States as a stockholder or guarantor no other

rights than any other interest also assisting in the enterprise. A British, German, French or Japanese steamship company might subscribe, own and hold large blocks of stock or bonds in a corporation provided in section 2, and with equal right under the treaty might demand a preference for its vessels as an exception on account of such ownership. Of course such a demand would be absurd and unjust, and yet equally valid and equitable as a similar demand and exception for the United States. *The terms of the treaty and the existing situation would seem to practically and legally make the United States a corporation sole, for the purpose of constructing, operating, and managing the canal, with exactly the same rights, obligations and responsibilities which would pertain to any other corporation provided for by the treaty, doing exactly the same thing under the treaty. But as an incident to ownership, the vessels of the owner, used for its own purposes in connection with the project, could undoubtedly be passed. A corporation could pass its vessels used for canal purposes. Equally the United States as a sovereign passes its public vessels used for its own purposes.* That is what this section means. But its qualifying phrases clearly exclude the vessels and commerce of all else than of the owner, the sovereign in the case of the United States. The article clearly grants rights to the vessels belonging to the sovereign and as clearly puts vessels belonging to the citizens of that sovereign on the same terms as vessels of the citizens of all nations.

"One of the principal arguments that the United States is not included within the terms 'of all nations observing these rules,' is that because the United States

is required to make and promulgate the rules, the treaty should not be construed as holding that the nation which makes the rules should be included within or bound by the rules to be promulgated by itself. This is clearly fallacious, because Article II provides that 'subject to the provisions of the treaty' the United States shall have the rights incident to such construction, and so forth. That, of course, applies the remaining portion of the treaty to the rights of ownership. The remaining portions of the treaty are Articles III and IV containing the rules framed upon the rules governing the Suez Canal. These rules at Suez and the similar ones at Panama embrace all vessels of commerce of all nations. An inspection of the rules themselves clearly shows that they do apply and were intended to apply to the United States.

"It must be admitted that the last sentence of Section 1, Article III, applies to the United States, 'such conditions and charges of traffic shall be just and equitable.' If not, then this nation can make unjust rules which would practically make the canal useless to the other nations. Again, the last sentence of Section 2 applies in terms 'the United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.' It is difficult to argue that such language does not apply to the United States. Section 5 provides that the provisions 'of this section shall apply to waterways adjacent to the canal within three marine miles of either end.' This was inserted because both Great Britain and the United States at various times had insisted that the three-mile limit might be extended under

certain conditions. It was agreed here clearly that the three-mile limit shall apply as one of the rules binding the United States in its treatment of the canal, except in time of war. Section 6 binds the United States itself in the time of war and peace to maintain the integrity of the canal plant. This is the main purpose of this section. *So any reasonable examination of these rules clearly shows that they do apply to and bind the United States and were so intended when framed. One other thought in this connection: The preamble applies the general principle of neutralization to these rules, as set forth in Article VIII of the Clayton-Bulwer treaty. This principle is for equality and equity of treatment of all—the essence of these rules. The preamble binds the whole treaty, and so the United States. Of course, as it has been heretofore stated, that in the time of war the treaty ceases to operate and the United States may adopt any means necessary for its defense and temporarily close the canal.*

* * *

"In the construction of the controverted clauses of any document it is always of prime importance to know exactly what the persons themselves intended by the language which is subject to dispute; and when they have set forth their own ideas as to its intention and meaning and have given good reasons for it, usually such facts have been conclusive as to the construction whenever the language has fairly allowed.

"The negotiations for the modification of the Clayton-Bulwer treaty and for the framing of the Hay-Pauncefote treaty were commenced by Secretary of State John Hay by a letter, December 7, 1898, to Hon. Henry White,

chargé at London, and the reply of Mr. White, of date December 22, 1898. * * *

"From these and other letters it appears in at least three different places *that the first and necessary condition of a treaty must be that all vessels of all nations must receive in the use of the canal the same terms and treatment as American vessels. This condition was emphasized more than any other one provision, and descriptive references were forwarded to make it clear that such clause must include all vessels of all classes, foreign and coastwise*, so there could be no mistake about the meaning of any language in the treaty.

"Secretary Hay and our Government readily agreed to such condition, and nobody objected to it, *because it has always been the consistent, continuous and historic policy of our Government for more than fifty years to do that identical thing.*

* * *

"So Secretary Hay, with the approval of President McKinley and the proper officials of the United States, prepared the Hay-Pauncefote treaty and submitted it to Great Britain. In it were placed the clauses, heretofore referred to, maintaining the general principle of 'equality and neutrality,' and expressly setting forth in as clear and explicit language as possible 'that the vessels of commerce and war of all nations should be treated on terms of entire equality, so that there shall be no discrimination against any nation, its citizens or subjects, in respect of the conditions or charges of traffic or otherwise.' Not a hint of any exception for our commerce, or any other exception; but on the contrary, the correspondence showed that all

officials intended clearly and beyond question that 'all vessels, commerce and citizens must be treated exactly alike.'

"Surely this preliminary history, these negotiations, the language itself, the preamble and then the proclamation, in terms following and adopting the language, should be sufficient to show that no ambiguity or implication of any other meaning could possibly exist. In ordinary cases it would be sufficient, and no further question could be raised. But one additional fact still further re-enforces this history and construction.

"At that time the ambassador of the United States to Great Britain was the Hon. Joseph H. Choate. He was absent at the time the negotiations were commenced, but returned, and, of course, became intimately acquainted with the proceedings as to both treaties. In a recent address he has stated emphatically his own recollections and understanding of the occurrences at that time.

* * *

It is true that I had something to do with the negotiation of this treaty. In the summer of 1901—you will remember that this treaty was ratified by the Senate in November, 1901—I was in England until October and was in almost daily contact with Lord Pauncefote, who on his side represented Lord Lansdowne, the foreign secretary, and was also in very frequent correspondence with Mr. Hay, our Secretary of State, under whom I was acting. As the lips of both of these diplomatists and great patriots, who were each true to his own country and each regardful of the rights of the other, are sealed in death, I think it is quite proper that I should say what I believe both of them, if they were here, would say today—that the clause in the Panama Canal bill exempting coastwise American shipping from the payment of tolls is in direct violation of the treaty.

I venture to say now that in the whole course of the negotiation of this particular treaty no claim, no suggestion, was made

that there should be any exemption of anybody. How could there be in face of the words they agreed upon? Lord Pauncefote and John Hay were singularly honest and truthful men. They knew the meaning of the English language, and when they agreed upon the language of the treaty they carried out the fundamental principle of their whole diplomacy, so far as I know anything about it, and in the six years I was engaged with them their cardinal rule was to mean what they said and to say what they meant.

"*Only a few weeks ago Hon. Henry White delivered an address in Washington, in which he clearly and strongly affirmed the terms stated in the original note and correspondence, that the intention always existed on the part of all the officials of both Governments that vessels of commerce of both and all nations should always be treated on terms of entire equality. This would include all trade—foreign and coastwise. Mr. White has a more intimate knowledge of the actual transactions than any living man, and his statement should be conclusive with fair and just men.*"

Senator Root's speeches of January 21, 1913, and May 21, 1914, are equal to the best forensic efforts in the United States Senate. In the excerpts therefrom which follow, the Senator advances a new argument for tolls-exemption repeal which is *sui generis*.

ARTICLE III

The United States adopts, as the basis of the neutralization of such ship canal, the following rules, substantially as embodied in the convention of Constantinople, signed the twenty-eighth of October, 1888, for the free navigation of the Suez Canal; that is to say:

"1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination

against any such nation or its citizens or subjects in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable."

* * *

"What is the 'entire equality' contemplated by Rule 1 of Article III of this treaty? Is it entire so that it assures equality in comparison with all ships engaged in the same trade similarly situated, the same kind of trade, or is it partial, so as to be equality in comparison only with certain ships engaged in the same kind of trade and not applying to other ships engaged in the same kind of trade, to wit, not applying to ships which are owned by American citizens?

* * *

"Is the kind of equality that is assured such that there will be no discrimination or that there will be no discrimination except against the ships of other nations and in favor of ships belonging to American citizens?

"Now, let us examine the question in the light of the circumstances which surrounded the making of this treaty and the conditions under which it was made. Treaties cannot be usefully interpreted with the microscope and the dissecting knife as if they were criminal indictments. Treaties are steps in the life and development of great nations. Public policies enter into them; public policies certified by public documents and authentic expressions of public officers. Long contests between the representatives of nations enter into the choice and arrangement of the words of a treaty. If you would be sure of what a treaty means, if there be any doubt, if there are two interpretations suggested, learn out of what conflicting public

policies the words of the treaty had their birth; what arguments were made for one side or the other, what concessions were yielded in the making of a treaty. Always, with rare exceptions, the birth and development of every important clause may be traced by the authentic records of the negotiators and of the countries which are reconciling their differences. So it is the universal rule in all diplomatic correspondence regarding international rights, in all courts of arbitration, that far more weight is given to records of negotiations, to the expressions of the negotiators, to the history of the provisions than is customary in regard to private contracts or criminal indictments.

"This question as to the kind of equality that the makers of this treaty intended to give divides itself very clearly and distinctly into a question between two perfectly well-known expedients of treaty making; one is the favored-nation provision, with which we are all very familiar in commercial treaties, and the other is the provision according to citizens of another country rights measured by the rights of the nationals or citizens of the contracting country. The most-favored-nation provision has its most common expression in the provision regarding tariff duties, a provision that no higher duties shall be charged upon goods imported from one foreign country than upon goods imported from other foreign countries. That is the common 'most-favored-nation clause.'

* * *

"A careful examination shows this to be a fact: That it is the universal rule, with rare exceptions, that wherever the rights of the citizens of a contracting country can be made the standard of equality for the citizens of another

country they are made so, and that recourse is not had to the most-favored-nation clause, except where that higher degree of equality is impossible because the citizens of the two countries occupy different relations to the business that is contemplated.

"So we have the question between these two kinds of equality clearly drawn and resting upon long experience of nations, a subject fully understood by the negotiators of this treaty upon both sides.

"We know now that the negotiators of this treaty, the men who made it, all understood that the larger equality was intended by its terms. Of course, what the negotiator of a treaty says cannot be effective to overthrow a treaty; but I think we must all start, in considering this question, with the assumption that the words are capable of two constructions. I think no one can deny that, in view of the differences of opinion which have been expressed here regarding their meaning. So here are words capable of two constructions, a broad construction and a narrow construction, but the fact that all the makers of the treaty intended that the words they used should have the larger effect is certainly very persuasive toward the conclusion that those words should receive the larger effect. Not only the American negotiators but the British negotiators as well so understood it. Whenever we seek to impose upon these words a narrower construction for our own interests than the makers of the treaty understood them to have, we should remember the fundamental rule of morals that a promiser is bound to keep a promise in the sense in which he had reason to believe the promisee understood it was made. * * *

"The kind of equality which the negotiators intended—that is, an equality in which the treatment of American citizens is made the standard for the treatment of foreign citizens—had during all the history of the Isthmian Canal efforts been the standard sought for in negotiations and treaties. That kind of equality was the standard adopted by the public policy of the United States for all similar enterprises. It was customary; it was uniform; it was natural for negotiators of a treaty relating to a canal. Let me illustrate that by referring to the initial treaty on this subject, the treaty of New Granada of 1846. When the American negotiators making that treaty dealt with the subject of a railroad and canal, what kind of equality did they stipulate for? Why, this:

> The Government of New Granada guarantees to the Government of the United States that the right of way or transit across the Isthmus of Panama upon any modes of communication that now exist, or that may be hereafter constructed, shall be open and free to the Government and citizens of the United States, and for the transportation of any articles of produce, manufactures or merchandise of lawful commerce belonging to the citizens of the United States; that no other tolls or charges shall be levied or collected upon the citizens of the United States of their said merchandise thus passing over any road or canal that may be made by the Government of New Granada or by the authority of the same than is, under like circumstances, levied upon and collected from the Granadian citizens.

"The message of President Polk transmitting this New Granada treaty of 1846 to Congress dwells especially upon the assurance to citizens of the United States of equal charges and equal facilities in the use of railroad and canal with citizens of New Granada.

"I go back again to the Clayton-Bulwer treaty of

1850. There is no doubt about the kind of equality which the negotiators considered it to be valuable to get, useful to get, natural to get.

* * *

"Article VIII provides that—

> It is always understood by the United States and Great Britain that the parties constructing or owning the canal shall impose no other charges or conditions of traffic thereupon than are just and equitable, and that the same canals or railways, being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other State.

"You will perceive, sir, that the terms on which citizens of other countries were to be allowed to come in were not terms of the most-favored nations as among themselves. They were on like terms with those which existed between Great Britain and the United States; that is to say, each other country which came in and adhered to this Clayton-Bulwer treaty was to have the rights of its citizens measured by the rights accorded to the citizens of the United States and to the citizens of Great Britain.

* * *

"We are asked to believe that starting with the Clayton-Bulwer convention, which gave to Great Britain unquestioned assurance of the larger and more valuable equality of her vessels with the vessels of American citizens, in a negotiation with a country which in all its history had insisted regarding all canals that the measure of equality should be the measure of service and of charges to its national citizens, abandoned the vantage ground of the Clayton-Bulwer treaty and gave up that basis of equality without one word in the negotiation, without

discussion, without its being asked, without its being mentioned without its knowing it, without the other, negotiators knowing it. But that is not all.

"It was not merely the immemorial policy of the United States and Great Britain regarding all canals; it was not merely the general public policy of the United States and Great Britain regarding all ports and waters, but it was the policy of the United States regarding trade the world over, and the champion and protagonist of that policy was John Hay. At the very time that he was negotiating the Hay-Pauncefote treaty he was appealing to the justice of all the nations of the world for the 'open door' in China; he was appealing to them in the interest of the world's commerce, in the interest of civilization to accord in all their possessions in China, what? Favored-nation treatment? Oh, no; the same treatment that they accorded to their own citizens. Let me ask you to attend for a moment to things that John Hay wrote regarding this great design, the accomplishment of which will ever stand in the history of diplomacy as one of the proudest contributions of America to the progress of civilization. On September 6, 1899, he wrote to Mr. Choate in London:

> The Government of Her Britannic Majesty has declared that its policy and its very traditions precluded it from using any privileges which might be granted it in China as a weapon for excluding commercial rivals, and that freedom of trade for Great Britain in that Empire meant freedom of trade for all the world alike. While conceding by formal agreements, first with Germany and then with Russia, the possession of "spheres of influence or interest" in China, in which they are to enjoy special rights and privileges, more especially in respect of railroads and mining enterprises. Her Britannic Majesty's Government has therefore sought to maintain at the same time what is called

the "open-door policy" to insure to the commerce of the world in China equality of treatment within said "spheres" for commerce and navigation.

* * *

"So he wrote all of the great nations of the world an appeal for equal treatment, an appeal for a specific stipulation to secure the equal treatment that no higher charges should be imposed upon the citizens of any other country in the ports and waters possessed by those great powers in China or for freight or passage over the railroads built and controlled by them than were imposed upon their own citizens. To that appeal all the great powers of the world responded in affirmance; and on the twentieth of March, 1900, Mr. Hay was able to issue his circular of instructions to all the ambassadors and ministers of the United States announcing the universal assent of the world to that great principle of equality—equality measured by the rights of the citizens of the nation granting it in all the Empire of China; yet we are asked to believe that John Hay denied, abjured, repudiated that policy of civilization in regard to the Panama Canal at the very moment that, through the same agents, he was enforcing the policy upon the same countries; and that he did it without knowing it.

"But, we are not left to inferences which must be drawn from the circumstances that I have mentioned or from declarations of public policy or from the uniform course and custom of treaty making regarding canals and regarding public waters and transportation. There is positive, and it appears to me conclusive, affirmative evidence that the negotiators did effectively proceed

in making this treaty in accordance with the honorable obligation of their country as the builder and maintainer of a public utility, as the champion of equal commercial rights the world over.

"We begin the consideration of the express provisions leading to the conclusion that the larger equality was intended with the communication of the Hay-Pauncefote treaty to the Senate. Of course, we are all familiar with the terms of the preamble preserving the general principle of Article VIII of the Clayton-Bulwer treaty. Let me read them again, however, for convenience of reference:

> The United States of America and His Majesty Edward the Seventh, of the United Kingdom of Great Britain and Ireland, and of the British dominions beyond the seas, King, and Emperor of India, being desirous to facilitate the construction of a ship canal to connect the Atlantic and Pacific Oceans, by whatever route may be considered expedient, and to that end to remove any objection which may arise out of the convention of the nineteenth of April, 1850, commonly called the Clayton-Bulwer treaty, to the construction of such canal under the auspices of the Government of the United States, without impairing the "*general principle*" of neutralization established in Article VIII of that convention. * * *

"Now we are told that the language of a treaty or of a contract or of a statute cannot be changed by the preamble; but what is the purpose of a preamble? The purpose is to afford a guide to the interpretation of the terms of the treaty or of the statute. When you start with the third article of the Hay-Pauncefote treaty and have a debate as to its interpretation, you turn to the preamble and you find there a guide intended by the makers of the treaty to enable you to reach the right interpretation upon the terms of the third article. But,

still further than that, the idea of not impairing the general principle of neutralization is carrried into the treaty itself, for in Article IV—

> It is agreed that no change of territorial sovereignty or of international relations of the country or countries traversed by the before-mentioned canal shall affect the general principle of neutralization or the obligation of the high contracting parties under the present treaty.

"That is, repeating in the fourth article as being a part of the treaty itself, the words of the preamble that the obstacles of the Clayton-Bulwer treaty are to be removed without impairing the general principle of neutralization established in Article VIII of that convention.

"This preamble, sir, which refers to the general principle of neutralization in the Clayton-Bulwer treaty and which manifestly is designed to preserve in the Hay-Pauncefote treaty something of the Clayton-Bulwer treaty, has been treated in discussion as being a matter of not very much importance. Not so the view of the negotiators of the treaty. Not so the view of anybody connected with our Government at the time the treaty was made, for you will perceive, in the first place, that in the letters of transmittal of the treaty special pains are taken to have it understood that this treaty preserves unimpaired something which is called the general principle of neutralization.

"Mr. Hay, in transmitting the Hay-Pauncefote treaty to the President, writes:

> I submit for your consideration * * * a convention * * * to remove any objection which may arise out of the * * * Clayton-Bulwer treaty * * * without impairing the *"general principle"* of neutralization established in Article VIII of that convention.

"President Roosevelt, in transmitting the treaty to the Senate, says:

> I transmit, for the advice and consent of the Senate to its ratification, a convention signed November 18, 1901. * * * to remove any objection which may arise out of the convention of April 19, 1850, * * * to the construction of such canal under the auspices of the Government of the United States without impairing the "*general principle*" of neutralization established in Article VIII of that convention.

"That feature of the Hay-Pauncefote treaty is dwelt upon and made extraordinarily prominent, and there is a manifest feeling that the Senate ought not to lose sight of it in considering whether it shall advise the ratification of the treaty.

* * *

"*The only two things in Article VIII are the equality of service and of charge between the vessels of the United States and those of Great Britain and the extension of that to other countries that come in and the obligation of protection. The great object of the negotiation of the Hay-Pauncefote treaty was to take over to the United States alone the duty and the right of protection. That was the difference between the Hay-Pauncefote treaty and the Clayton-Bulwer treaty—that Great Britain was to surrender the right of protection, to be relived from the duty of protection, and no other countries were to be permitted to come in and exercise the right of protection. The United States was to put itself on the platform that Blaine laid down in* 1881 *as the sole protector of the canal. What, then, was there to be preserved unimpaired in the eighth article of the Clayton-Bulwer treaty? Nothing except the basis of equality, equality between the United States and Great Britain, equality measured by the*

*treatment of the nationals of one country for the nationals of the other. Nothing else was left to be preserved unimpaired.*

* * *

"Mr. Hay, in his letter to Senator Cullom at the time the treaty was under consideration by the Senate, says:

> He (the President) not only was willing but earnestly desired that the "*general principle*" of neutralization referred to in the preamble of this treaty and in the eighth article of the Clayton-Bulwer treaty should be perpetually applied to this canal. This, in fact, had always been insisted upon by the United States.

"There was no change in policy.

> He recognized the entire justice and propriety of the demand of Great Britain that if she was asked to surrender the material interest secured by the first article of that treaty, which might result at some indefinite future time in a change of sovereignty in the territory traversed by the canal, the "*general principle*" of neutralization as applied to the canal should be absolutely secured.

"*Whatever else the Hay-Pauncefote treaty means, it means to secure absolutely the general principle of neutralization contained in the eighth article of the Clayton-Bulwer treaty, which was, according to the understanding of the makers of the Hay-Pauncefote treaty, the absolute equality of the ships, the citizens and the subjects of all nations with the ships and the citizens of the United States and of Great Britain; and we are not at liberty to spell out any different meaning of the Hay-Pauncefote treaty.*

* * *

"The third article of the Hay-Pauncefote treaty provides:

> The United States adopts, as the basis of the neutralization of such ship canal, the following rules, substantially as embodied

in the convention of Constantinople, signed the twenty-eighth of October, 1888, for the free navigation of the Suez Canal.

"Article XII of the Suez Canal convention provides that dues are to be levied without exception or favor upon all vessels under like conditions.

"That was a fundamental basis under which the Suez Canal was to be operated. The convention proceeds:

> The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag.

* * *

"This convention which makes that declaration of absolute and universal equality of tolls a basis of its agreement was made after Great Britain had become the chief owner and arbiter of the canal. Now, I come back to the Hay-Pauncefote treaty. Article III:

> The United States adopts as the basis of the neutralization of such ship canal the following rules, substantially as embodied in the convention of Constantinople, etc.:
>
> 1. The canal shall be free and open to the vessels of commerce and of war of all nations observing the rules on terms of entire equality.

"An '*entire equality*' substantially as embodied in the Suez convention. You are bound to say that the equality was substantially the same. When these negotiators at that very instant were appealing to the Suez convention and declaring the treaty they were making was substantially the same in the rule of equality which it prescribed, when they were declaring that what they were doing was substantially like what the Suez convention did—you are not at liberty to say that at that very instant they meant something entirely different. If you do that, you say

they were dishonest, they were disingenuous, they were deceiving Great Britain.

"Ah, the worst thing about it is that our Government has said from generation to generation it was going to treat all the world alike in whatever it did about this canal; that the makers of our treaty declared that they were preserving unimpaired the equality established in the eighth article of the Clayton-Bulwer treaty; that the makers of our treaty declared that the provision for equality was substantially the same as that in the Suez treaty; *that that was the uniform, the unvarying attitude of the United States in every step which we took to acquire title to the Canal Zone and to get the unrestricted right to own and operate the canal; and not until after we got it, not until after we were secure, did any American ever broach the idea that we were to use the canal for selfish advantage commercially*; that to the political control, to the military control, to the power of ownership and regulation and management we were to add a discrimination against all the rest of the world for the purpose of enabling our merchant ships to outdo them in competition."

We will now use excerpts from an able speech by Senator Burton:

"OUR DEMANDS IN RELATION TO CANADIAN WATERWAYS IN 1888 TO 1892.

* * *

"The Canadian Government in council had in substance decreed that while the tolls on cargoes carried through the Welland Canal should be twenty cents per ton on eastbound freight, yet if the boat went as far as

Montreal there should be a rebate of eighteen cents a ton, leaving the net toll only two cents. This gave a preference to the port of Montreal as compared with the ports of the United States on Lake Ontario, the St. Lawrence River, and, in fact, upon the north Atlantic seaboard. Its manifest object was to increase the importance of Montreal as a port for the export of grain and other commodities.

* * *

"A resolution by unanimous vote of Congress authorized the President to issue a proclamation in retaliation; also the proclamation in retaliation of August 18, 1892. This action led to a revocation of the regulation of the Canadian Government by order of the council, so that equal privileges were afforded to the ships and commerce of both nations.

"The distinct assertion by all of our statesmen who took part in this controversy or declared themselves upon the subject was that by the treaty of 1871 equality of treatment was secured not only for our shipping, but for our citizens, that regard must be had for the routes of transportation to prevent discrimination against the United States in trade. But it should be very carefully noted that the treaty of 1871 did not contain so strong language as the Hay-Pauncefote of 1901. Indeed, it is not only plausible but extremely probable that the language of the treaty of 1871 was in mind when that of 1901 was drawn, and that the object was to secure equality beyond the possibility of any ambiguity. The language of the treaty of 1871 is:

The Government of Her Britannic Majesty engage *to urge*

upon the Government of the Dominion of Canada to secure to the citizens of the United States the use of the Welland, St. Lawrence and other canals in the Dominion *on terms of equality with the inhabitants of the Dominion.*

"The language of the Hay-Pauncefote treaty is:

The canal *shall be free and open* to the vessels of commerce and of war of all nations observing these rules on terms of *entire* equality, *so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise.*

"There is no question of territory involved in Canadian canals, either the Welland or those below Lake Ontario beside the rapids along the St. Lawrence River. They are all within the Dominion of Canada. It was not necessary to acquire the land through which they pass to build a canal as 'a trust for the world.' The argument in favor of the right of exclusion is, we must admit, much stronger than it is in the case of the Panama Canal; yet when a discrimination in tolls, which it was alleged was not altogether against our ships, was attempted, we demanded that it should be done away with, because it discriminated against our citizens and diverted trade and transportation which naturally belonged to our own country in another direction. Can we afford to assert the principle of equality in the use of channels when it benefits us and our trade, and at the same time establish another and entirely opposite rule when the canal or route belongs to us?

* * *

"The slight attention given in these debates to our demand from 1888 to 1892 for equal privileges in the Welland Canal and other Canadian channels is hardly

fair to those who advocate the repeal of this exemption. During the debates in July and August of 1912 the demand was made that the supporters of the House bill should reconcile their position with the attitude of the United States on this question during the administrations of President Cleveland and President Harrison. I do not recall that any reply was made to that challenge of 1912 for a consistent explanation of our course in 1888 to 1892. But now, after the lapse of two years, the explanation is offered that neither Canada, nor Great Britain acting for her, ever conceded that they were wrong; but that to the last they maintained the correctness of their position and yielded merely as a matter of expediency. But does even that afford one particle of justification for us to insist upon this preference?

"We made an insistent demand, not merely by diplomatic notes, but by action of Congress and by a retaliatory proclamation expressing our interpretation of the principles involved in the treaty relating to the Welland Canal and asserting the observance of our traditional policy. The action taken then was in entire harmony with declarations theretofore made in regard to the proposed Isthmian Canal, and our demands in regard to other waterways in foreign countries extending over one hundred years. It must be conceded that the position taken by the act of 1912 was squarely in contradiction to that of 1892.

"*Can we now, under changed conditions, and when we will be benefited by observing a different rule, afford to declare that our deliberate action then taken was wrong? Was there one law of honor and patriotism in* 1892 *and*

*another in* 1912*? Does it require only twenty years to change the law of fairness between nations?*

"* * * It has been maintained in this discussion that the Panama route is a national waterway, as it is located upon territory owned by the United States, and thus within its sole jurisdiction. Indeed, the very extreme statement has been made that we could not respect the suggestion of another Government to make all tolls equal, because it would involve an abandonment of sovereignty. * * *

"A strip ten miles in width was granted for its construction, but this was not a territorial acquisition. If so, it would have been absolutely contrary to our settled policy with reference to the republics to the south of us. For this strip we pay an annual rental of $250,000, which is quite inconsistent with a fee-simple title. A width of ten miles was regarded as necessary for the convenient construction and operation of the canal. Material was obtained from this area or zone in the work that was done. Also material was deposited upon it. Provision was made in the treaty for going outside the zone on payment of proper compensation, if necessary for the construction of the canal. It was deemed desirable that the land obtained be permanently held for the habitation of those engaged in the operation of the canal and for sanitary and police control in its immediate locality. Had the mere ground through which the canal is excavated been obtained, it would have been easy for marauders to approach it, and the safeguarding of the health of the employees would have been difficult. The language of the treaty itself expresses in the clearest terms that the

grant of land in Panama is in trust for a certain purpose and not for territory to be incorporated in the United States as a part of its general domain.

"As compared with other portions of the United States the distinctions in the control exercised over this strip are very marked. There is no legislative body. There is no provision for elections. A governor is appointed by the President. In the express language of the statute, the Canal Zone 'is to be held, treated, and governed as an adjunct of such Panama Canal.' The customs laws of the United States are not applicable there, nor have the inhabitants of this strip the right to send their merchandise into the United States in the manner granted to the people of our country. Imports from the Canal Zone pay duties at our customhouses in the same manner as imports from a foreign country. Imports into the Canal Zone are not subject to the duties imposed by our laws. The War Department has assumed the authority of fixing customs regulations without any reference to Congress whatever. The canal, instead of being an artery of commerce, supplying a large adjacent territory, such as is the case with the great rivers or waterways of the United States, is limited to furnishing what is needed for those who operate the canal and to the promotion of its traffic. Whatever trans-shipment there may be, whatever coaling or supply stations may be established, are but incident to the waterway between the oceans, and are provided to facilitate traffic through the canal. The most important of all, however, is the fact that this waterway is a mere connecting link between the two oceans, less than fifty miles in length, and is constructed

as a part of maritime routes of great length providing a waterway to aid the means of communication between nations, many of which are remote from the canal and are located upon seas or oceans.

"Second. It has been maintained that there is a marked distinction between natural and artificial waterways in the degree of control which may be exercised over them by the countries through which they pass.

"The more recent declarations of publicists and international lawyers, however, all favor the idea that artificial canals connecting great bodies of waters are international waterways. This principle was asserted in the most unequivocal language in the convention relating to the Suez Canal of 1888. The duty of a country owning the territory through which a canal may be constructed to afford opportunity for its construction was maintained in the most strenuous manner by President Roosevelt in his action with reference to Colombia.

"There is no clearer statement of the American view on the subject than that contained in a letter from the Hon. Lewis Cass, our Secretary of State under President Buchanan, to Mr. Lamar, our minister to the Central American States, on July 25, 1858. He wrote, in referring to the country or countries through which a canal might be constructed, the following:

> *Sovereignty has its duties as well as its rights,* and none of these local governments * * * would be permitted, in a spirit of eastern isolation, to close these gates of intercourse on the great highways of the world and justify the act by the pretension that these avenues of trade and travel *belong to them,* and that they choose to shut them or, what is almost equivalent, *to encumber* them with such unjust regulations as would prevent their general use.

"We can reach no conclusion except that a canal constructed like the Panama, under a concession, the aim and object of which is merely to provide a connecting waterway, especially in view of the language of the Hay-Pauncefote treaty, is to be considered as an international watercourse and subject to the rules pertaining to natural straits. There is, of course an exception to this, so far as regards the necessity of adopting necessary regulations to protect against hostile attack, the necessity of adopting proper regulations to insure the safety of boats in passing, to provide against injury to locks and other constructions, to police the canal and enforce sanitary regulations. Again, the position of an artificial waterway is exceptional in that the cost of construction allows the imposition of tolls as a compensation for the expense of the improvement, though in many instances the improvement of natural channels so as to make them readily available for navigation is very large, and, in kind, the same as the building of artificial waterways. Indeed, it is often a question over a given stretch of a river whether the most feasible method to secure navigation is by improving the main stream or by a lateral canal. In modern times the demand is that navigation have free scope, without interruption from pirates, from payment of tribute, or from discrimination. As has been pointed out, there is no nation which has been quite so insistent in this principle as our own. The tendency of recent years in the making of treaties and agreements is altogether against discrimination in the use of artificial waterways. It should again be said that our own policy, as exemplified in negotiations with Canada, shows that we have maintained

the principle that when a canal is a connecting link in a longer route afforded by rivers or by sea, it must be open on equal terms to all. *Every declaration made upon this subject in the earlier years when negotiations were under way for an Isthmian canal would condemn in the most decisive language any attempt on our part to discriminate in our favor in any canal connecting the two oceans.*

* * *

"The treaties pertaining to a proposed Isthmian canal are especially significant. In that of 1846 with New Granada there are two provisions. Article III contains the usual clause exempting the coastwise trade of either country. Article XXXV, which has to do with the ports of the Isthmus of Panama or any road or canal across the Isthmus that may be made by the Government of New Granada, or by the authority of the same, provides that there shall be no other tolls or charges levied or collected from the citizens of the United States than are, under like circumstances, levied and collected from the Granadian citizens.

"The Cass treaty of November 26, 1857, with Nicaragua, known as the Cass-Yrisarri treaty, in Article II reserves the coastwise trade; Article XIV grants transit on terms of equality to the Atlantic and Pacific, and contains the provision that no higher charges or tolls shall be imposed on the conveyance or transit of persons or property of citizens or subjects of the United States or any other country across said route of communication than are or may be imposed on the persons or property of citizens of Nicaragua. This treaty was not ratified.

Other treaties with Nicaragua and other countries make unequivocal reference to the coastwise trade.

"In the treaty with Panama of 1903 there is in Article XIX an exemption of the vessels of the Republic of Panama and its troops and munitions of war in such vessels from the payment of charges of any kind. This shows that when an exemption was intended it was regarded as necessary to state it. The Frelinghuysen-Zavala treaty, made in 1884 and recommended by President Arthur in his message of the same year, but withdrawn by President Cleveland in his first annual message of 1885, contained this provision in Article XIV:

> The tolls hereinbefore provided shall be equal as to vessels of the parties hereto and of all nations, except that vessels entirely owned and commanded by citizens of either one of the parties to this convention and engaged in its coasting may be favored.

"Thus all of these treaties—that with New Granada, the proposed agreements with Nicaragua, and the treaty with Panama—show that in all our negotiations pertaining to an Isthmian canal when it was intended to exempt coastwise shipping or to grant any preferences it was specifically so stated.

"Now, the Hay-Pauncefote treaty of 1901 contained no exemption of coastwise shipping, but, on the contrary, the very strongest language to express entire equality.

"Is it to be believed that when, through a series of years in practically all countries near to the proposed canal, coastwise shipping was exempt from the provisions of the treaties in the most definite language it could have been intended to claim exemption or preference for our own coastwise shipping in this canal, built on soil acquired

from a foreign country and connecting the two great oceans of the world, without any language whatever on the subject? If it was intended to exempt our coastwise shipping, why did we not say so? This, too, in the face of our own '*traditional policy*' asserted against Canada less than ten years before, and asserted contemporaneously, at least in principle, in negotiations with the nations having spheres of influence in the Chinese Empire.

* * *

"In opposing this bill for repeal nothing has been more frequent than an appeal to patriotism and to national pride. Any such appeal must necessarily be received with a responsive spirit, and if made with earnestness it stirs the heart. But patriotism does not mean that we shall disregard treaty obligations or swerve from policies which have been maintained with persistency and zeal through all our national life. It is our duty to maintain a scrupulous regard for national faith and to follow the rules which we have laid down for ourselves as well as for all other nations. To be consistent and to be fair to all the world, that is patriotism. If we retrace our steps from the ennobling record which has characterized us for more than one hundred years, let us beware lest the most inspiring notes of patriotism, though uttered with the tongues of men and of angels, may become as sounding brass and a tinkling cymbal."

### SENATOR ROOT ON THE SOVEREIGNTY OF THE CANAL ZONE

"Well, asserting that we were acting for the common benefit of mankind, willing to accept no preferential right

of our own, just as we asserted it to secure the Clayton-Bulwer treaty, just as we asserted it to secure the Hay-Pauncefote treaty, when we had recognized the Republic of Panama, we made a treaty with her on the eighteenth of November, 1903. I ask your attention now to the provisions of that treaty. In that treaty both Panama and the United States recognize the fact that the United States was acting, not for its own special and selfish interest, but in the interest of mankind.

"The suggestion has been made that we are relieved from the obligations of our treaties with Great Britain because the Canal Zone is our territory. It is said that, because it has become ours, we are entitled to build the canal on our own territory and do what we please with it. Nothing can be further from the fact. It is not our territory, except in trust. Article II of the treaty with Panama provides:

> The Republic of Panama grants to the United States in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said canal—
>
> "And for no other purpose—
>
> of the width of ten miles extending to the distance of five miles on each side of the center line of the route of the canal to be constructed.
>
> * * *
>
> The Republic of Panama further grants to the United States in perpetuity the use, occupation and control of any other lands and waters outside of the zone above described which may be necessary and convenient for the construction, maintenance, operation, sanitation and protection of the said canal or of any auxiliary canals or other works necessary and convenient for the construction, maintenance, operation, sanitation and protection of the said enterprise.

"Article III provides:

The Republic of Panama grants to the United States all the rights, power and authority within the zone mentioned and described in Article II of this agreement—

"From which I have just read—

and within the limits of all auxiliary lands and waters mentioned and described in said Article II which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority.

"Article V provides:

The Republic of Panama grants to the United States in perpetuity a monopoly, for the construction, maintenance and operation of any system of communication by means of canal or railroad across its territory between the Caribbean Sea and the Pacific Ocean.

"I now read from Article XVIII:

The canal, when constructed, and the entrances thereto shall be neutral in perpetuity, and shall be opened upon the terms provided for by Section 1 of Article III of, and in conformity with all the stipulations of, the treaty entered into by the Governments of the United States and Great Britain on November 18, 1901.

"*So, far from our being relieved of the obligations of the treaty with Great Britain by reason of the title that we have obtained to the Canal Zone, we have taken that title impressed with a solemn trust. We have taken it for no purpose except the construction and maintenance of a canal in accordance with all the stipulations of our treaty with Great Britain. We cannot be false to those stipulations without adding to the breach of contract a breach of the trust which we have assumed, according to our own declarations, for the benefit of mankind as the mandatory of civilization.*

"In anticipation of the plainly-to-be-foreseen contingency of our having to acquire some kind of title in order to construct the canal, the Hay-Pauncefote treaty provided expressly in Article IV:

> It is agreed that no change of territorial sovereignty or of international relations of the country or countries traversed by the before-mentioned canal shall affect the general principle of neutralization or the obligation of the high contracting parties under the present treaty.

"So you will see that the treaty with Great Britain expressly provides that its obligations shall continue, no matter what title we get to the Canal Zone; and the treaty by which we get the title expressly impresses upon it as a trust the obligations of the treaty with Great Britain. How idle it is to say that because the Canal Zone is ours we can do with it what we please.

"In the message which was sent to Congress by President Roosevelt on the 4th of January, 1904, explaining the course of this Government regarding the revolution in Panama and the making of the treaty by which we acquired all the title that we have upon the Isthmus, President Roosevelt said:

> If ever a Government could be said to have received a mandate from civilization to effect an object the accomplishment of which was demanded in the interest of mankind, the United States holds that position with regard to the interoceanic canal.

"There has been much discussion for many years among authorities upon international law as to whether artificial canals for the convenience of commerce did not partake of the character of natural passageways to such a degree that, by the rules of international law, equality must be observed in the treatment of mankind

by the nation which has possession and control. Many very high authorities have asserted that that rule applies to the Panama Canal even without a treaty. *We base our title upon the right of mankind in the Isthmus, treaty or no treaty. We have long asserted, beginning with Secretary Cass, that the nations of Central America had no right to debar the world from its right of passage across the Isthmus. Upon that view we base the justice of our entire action upon the Isthmus which resulted in our having the Canal Zone. We could not have taken it for our selfish interest; we could not have taken it for the purpose of securing an advantage to the people of the United States over the other peoples of the world; it was only because civilization had its rights to passage across the Isthmus and because we made ourselves the mandatory of civilization to assert those rights that we are entitled to be there at all.* On the principles which underlie our action and upon all the declarations that we have made for more than half a century, as well as upon the express and positive stipulations of our treaties, *we are forbidden to say we have taken the custody of the Canal Zone to give ourselves any right of preference over the other civilized nations of the world beyond those rights which go to the owner of a canal to have the tolls that are charged for passage.*

THE FOLLOWING EXCERPTS, TAKEN FROM A SPEECH BY SENATOR LODGE, ARE NOTEWORTHY BECAUSE OF THEIR MORAL APPEAL:

"Almost all the nations largely engaged in commerce now pay either indirectly or specifically the tolls of their vessels passing through the Suez Canal. They will

undoubtedly do the same thing for their vessels which pass through the Panama Canal. If we choose to pay the tolls of our vessels passing through the Panama Canal, it is admitted by England and by all other nations that we have the right to do so.

* * *

"If the real purpose of our legislation is to benefit our shipping and insure an invincible competition to the railroads, whether foreign or domestic, the payment of the tolls on American vessels by the Government of the United States is our right of way through the treaty and is admitted to be so by all the nations of the earth. The steadfast refusal to adopt this obvious and undisputed method of aiding American shipping in competition with the transcontinental roads raises the inevitable inference that the primary object of insisting upon a naked toll exemption is not the benefit of American shipping and the reduction of water rates, but to achieve this result in a manner which shall demonstrate our disregard for the opinions and rights of foreign nations, and more particularly for the rights of England under the Hay-Pauncefote treaty. Personally, I think it most unwise to insist upon exempting our vessels from tolls with the single object of flouting the opinion and disregarding the rights of other nations as those nations understand their rights.

"I now come to another point which weighs very strongly with me in deciding against giving relief from tolls to American ships by the method employed by the canal act. Whatever our opinion may be as to the strict legal interpretation of the rules governing the matter of

tolls imposed upon vessels passing through the canal, we cannot and we ought not to overlook the understanding of those who negotiated the treaty as to the intent and effect of the rules which they framed. As to the nature of the understanding we have direct testimony. Mr. Henry White, who first laid before the British Government the desire of the United States to enter into negotiations for the supersession of the Clayton-Bulwer treaty, has stated that Lord Salisbury expressed to him the entire willingness of England to remove all obstacles which the Clayton-Bulwer treaty put in the way of the construction of the canal, and desired only to maintain equality of tolls imposed upon all vessels, including those of the United States. Mr. Choate, who, as I have said, completed the negotiations which resulted in the second Hay-Pauncefote treaty, has publicly stated that the understanding at that time of both parties was the same as that given by Mr. White. The only other American concerned in the actual negotiation of the treaty was the late Mr. Hay, at that time Secretary of State. I know that Mr. Hay's view was the same as that of Mr. Choate and Mr. White. It is therefore clear on the testimony of our three negotiators that the negotiations as they were begun and as they were completed in the second Hay-Pauncefote treaty proceeded on the clear understanding that there was to be no discrimination in the tolls imposed as between the vessels of any nation, including the vessels of the United States.

* * *

"Whether we shall insist upon giving to our ships two or three millions of dollars in a disputed way, is in

my conception, a very small question compared to the larger issues which are here involved. When the year 1909 opened, the United States occupied a higher and stronger position among the nations of the earth than at any period in our history. Never before had we possessed such an influence in international affairs, and that influence had been used beneficently and for the world's peace in two conspicuous instances—at Portsmouth and at Algeciras. Never before had our relations with the various States of Central and South America been so good. It seemed as if the shadow of suspicion which, owing to our dominant and at times domineering power, had darkened and chilled our relations with the people of Latin America, had at last been lifted. A world power we had been for many long years, but we had at last become a world power in the finer sense, a power whose active participation and beneficent influence were recognized and desired by other nations in those great questions which concerned the welfare and happiness of all mankind. This great position and this commanding influence have been largely lost. I have no desire to open up old questions or to trace the steps by which this result has come to pass, still less to indulge in criticism or censure upon anyone. I merely note the fact. I am not in the councils of the President of the United States, but I believe that during the past year the present position of the United States in its foreign relations has become very apparent to him, as it has to other responsible and reflecting men, and with this appreciation of our present position has come the earnest wish to retrace some of our steps, at least, and to regain, so far as possible, the

high plane which we formerly occupied. It would be an obvious impropriety to point out the specific conditions of our present relations with the various nations, both in the Old World and the New; it is enough to note the fact that we are regarded by other nations with distrust and in some cases with dislike. Rightly or wrongly, they have come to believe that we are not to be trusted; that we make our international relations the sport of politics and treat them as if they were in no wise different from questions of domestic legislation.

* * *

"The President has written the history of his country, and it would be strange, indeed, if he did not desire to maintain our tradition of good faith and fair dealing with the other nations of the earth. It is not well for any country, no matter how powerful, to be an outlaw among the nations. Not so many years ago there were people in England who used to speak with pride of her 'splendid isolation,' but they soon found out that while isolation might be splendid, it was in the highest degree undesirable. Since those days England has been making every effort to escape from her 'splendid isolation,' as has been conspicuously shown by the alliance with Japan and the entente with France.

"I suppose that at this moment in the midst of the adroitly stimulated passions raised against the President's recommendation that we should repeal the toll-exemption it will be thought very poor spirited and even truckling—I believe that is the accepted word—to suggest that in deciding this question we should take into consideration the opinions of other nations. Nevertheless, I consider

this a very important element in any decision which I may reach, and I am encouraged to believe that I am right in so thinking, because I have the warrant and authority of the author of the Declaration of Independence. When Jefferson framed that great instrument he declared that the impelling reason for making the Declaration was 'a decent respect to the opinions of mankind.' That decent respect to the opinions of mankind ought never to be forgotten in the decision of any question which involves the relations of our own country with the other nations of the earth.

"The long delay in the ratification by the Senate of the treaties renewing the arbitration treaties of 1908 produced a widespread feeling among other nations that our championship of the principle of arbitration and our loud boasts of our devotion to the cause of peace were the merest hypocrisy, because we seemed ready to abandon the cause of arbitration when it looked as if our treaties might bring us to the arbitration of questions which we did not desire to have decided by an impartial tribunal. The President renewed the arbitration treaties, and finally, after a delay which, as I have said, aroused unpleasant suspicions, those which have been sent to the Senate have been ratified. This was the President's first step, as I look at it, in his effort to restore the influence and reputation of the United States, which he had found to be impaired. His second step is his recommendation of the repeal of the toll-exemption clause of the canal act. I speak wholly without authority, but I believe that he must have thought that our insistence upon a contested interpretation of a treaty and upon a disputed method of relieving our vessels from the

payment of tolls has injured us in the opinion of civilized mankind, and that he believes that the object sought in no way justifies the results which will necessarily follow in the attitude of other nations toward us.

"He must be, I believe, satisfied, as I am satisfied, that other nations will hesitate long before they will enter upon treaties with a country which insists on deciding all disputed points in treaties in its own favor by a majority vote of Congress. It would not surprise me to learn that the President is of opinion that such disputed points ought to be settled as we have settled them in the past, with which, as a historian, he is familiar, either by negotiation or by arbitration and not by our own votes without appeal and open only to the arbitrament of the sword.

* * *

"We obtained by the passage of the toll-exemption clause no legal rights which we did not already possess; we waive none by its repeal. All we have we retain, for the law is merely our own statute for the regulation of the terms upon which the canal shall be used. The larger question which is raised by the toll-exemption, however, has a purely international character, and that we ought to decide, now and in the future, not on considerations of pecuniary profit or momentary political exigencies, but on the broad grounds which I have indicated. We should determine what is right without fear and without favor.

* * *

"For these reasons which I have set forth, although I believe we have the right to exempt our vessels from tolls, I have come to the conclusion that this clause in the canal act, which I have opposed from the outset, ought to be

repealed. * * * I think so because foreign opinion is united against us, while opinion in our own country is divided as to the proper interpretation of the language of the treaty, and I am not willing to have the good faith of the United States impugned on account of action taken upon such a contested ground as this. I think the exemption clause should be repealed because the understanding upon which the treaty was made is declared by all our negotiators to have been contrary to that which I think a strict legal interpretation of the terms of the rules would warrant. Finally, I think it should be repealed because a decent respect for the opinions of mankind and the high position of the United States among the nations of the world demand it. * * *

"The construction of the Panama Canal is one of the greatest achievements of the people of the United States. We owe a debt to the French who preceded us in the attempt to cut the Isthmus at that point, and we freely acknowledge the benefit which we have derived, not only from their surveys and their engineering but from the sacrifices which they so freely made in behalf of this great undertaking. I sincerely hope that the bill proposed by the Senator from Mississippi, to erect a monument to De Lesseps at the entrance to the canal, will be passed, and that that monument will also commemorate the deeds of the men who gave their lives to the task which their country had imposed. I hope, too, that when the canal is opened we shall permit the little boat named *Louise*, inherited by us from the French, to pass through with the first American battleship, and that we shall then give it to France, so that it may rest upon the waters of the Seine,

a memorial to a great work which the people of France first attempted and also to the long friendship of the two nations.

"But while France made the first effort and failed, we took up the work and carried it to completion. It is the greatest engineering feat of modern times, and the triumphant result is due not only to the genius of our military engineers but to the labor of the medical officers of the Army, who converted hot-beds of pestilence into a region as healthful as any on the face of the earth. Nothing, to my thinking, could be finer than the work of the great army which Colonel Goethals has led to this victory of peace, and which has never faltered or swerved in its onward march through mountains and by lakes. In all that vast expenditure, in all the enormous labors which have been begun and completed upon that historic Isthmus there is no spot or blemish to be found. Not only the canal itself but the manner in which it has been built are among the noblest national achievements, which the history of the United States will cherish and preserve. I trust that all this glory and that this noble work, done not merely for our own profit but for the benefit of the world, will not be disfigured by a desire to put money into the pockets of a few American citizens in a questionable manner. I should be grieved to see this great monument of American genius and American skill defaced by a sorry effort to affront other nations when we complete a vast work designed to promote not trade alone but peace and good will among all mankind."

Oscar S. Straus states from an international stand-

point the unwisdom of granting free transportation to our coastwise shipping.

"Are we now to cast aside all of our high purposes which have been consecrated by uniform practices for the past century and a quarter, from the administration of Washington to the administration of Wilson for a paltry sum at most of $2,000,000 annually? * * * Are we to sacrifice the decent respect for the opinions of mankind for this miserable mess of pottage? This phase of the subject I wish to emphasize, as the importance of it impresses itself upon me with greater force than perhaps it does some others, who have not been charged with service for the country in foreign lands, and therefore perhaps do not appreciate as fully as they otherwise would, its international aspect and relationship.

* * *

"You have before you * * * the understanding as to the meaning of the treaty given by our negotiators, Ambassador Choate and Henry White, who are both emphatic in their statement that there was no preference to be given to any of our ships over those of Great Britain. If any doubt remains in our midst, for there is no doubt on the part of other nations, let us not leave with them even a suspicion that because we have the power to construe this treaty to their disadvantage we would do them even an apparent injustice. Let us, on the contrary, emphasize that our word is as good as our bond and that our bond is not open to technical construction, or even to quibble, and that we will fulfill it not only to the letter but in accord with a broad and liberal spirit, as was so admirably expressed by Washington in his Farewell Address:

> It will be worthy of a free, enlightened, and, at no distant period, a great nation to give to mankind the magnanimous and too novel example of a people always guided by an exalted justice and benevolence.

"I have purposely avoided going over the general argument as to the construction of the treaty, and have tried to confine myself to the international aspect of it. I need not impress upon your mind the great value of a great reputation for fairness, for broadness of view on the part of a nation. We have or did have a tremendous influence in the councils of nations upon all questions affecting the international welfare of the world. Now, as a matter of policy, should we not do everything to continue that great power, and in the language of Sumner in his Prophetic Voices Concerning America, that 'the example of the United States will be more puissant than Army or Navy for the conquest of the world.'

"I think there is no doubt that the nations of the world feel that in excluding our coastwise ships from the payment of tolls that we—putting it in its mildest form—are making a technical construction for our advantage of an international treaty that is of interest to the whole world.

"Now, as a matter of policy, would it not be wise in consideration of the great influence that we can exert and are exerting in the court of nations, not to take advantage of what to them appears, and to many of the ablest men of the Senate and House appears, as a technical and narrow construction? That appears to me to be the broad view of the subject. I know from personal experience that many of the leading men feel that we, in making this construction, are technical, narrow and selfish."

The following newspaper clippings are in line with the foregoing:

"It is difficult for an American to realize the false position in which we have been placed as a nation by the enactment of two years ago, when we legislated in favor of freedom of American vessels engaged in the coastwise trade from the payment of tolls. However, our own selfish interests may prejudice us in our construction of the terms of the Hay-Pauncefote treaty, the fact remains that in Europe the treaty is looked upon as guaranteeing to other nations the use of the canal under exactly the same conditions as those which apply to the United States. Indeed, this action has won for us the unpleasant reputation of being willing to ignore plain treaty stipulations when our interests so suggest. In short, tradition, consistency and national honor all unite in demanding that we take speedy action to renounce this legislation of two years ago and that we at once place all our traffic through the canal upon the same basis as that of other nations."

"London, April 3.—The *Spectator*, commenting upon the status of the Panama Canal tolls repeal bill in the United States Congress, says in an editorial today:

> The honor of the United States is now at stake before the whole world. We do not think we shall be charged with affectation if we say that the question whether British ships are or are not to pay more than their share for the up-keep of the canal is as nothing compared with the question whether the United States can or cannot be counted upon to accept the obvious meanings of treaties and scrupulously to observe them.
>
> If the mighty Anglo-American race in the United States, which has received the imprint of Anglo-Saxon character, allows it to be said that the United States does not respect treaties, a

crippling blow will have been struck at the best of all Anglo-Saxon traditions. The value of international relations would be changed and the world would be different.

We will close this line of observations with appropriate comments by Charles Francis Adams:

"I feel strongly on the subject, and also as an American citizen, somewhat humiliated by the turn discussion is taking. So far as I can see, it is shockingly low in tone; quite worthy, perhaps, of 'Little Jack Horner,' but altogether unworthy of the occasion.

"The keynote of the discussion, it strikes me—as I suggested to you last evening—should have been Hamilton's somewhat famous remark that the American people must learn 'to think continentally.' This was said with an eye to provincial conditions then (1787) existing, and impeding the attainment of nationality. We have got beyond that now; and, in the present case, it is most desirable the American people should be made to think cosmopolitanly. We have attained a higher status.

"So it irritates and mortifies me to have this tolls discussion conducted, as it is the tendency to conduct it, on a country crossroads grocery level. I hear it said, for instance, by those who, it seems to me, should know better, that the Hay-Pauncefote treaty was a mistake and for us a 'bad bargain,' but we must 'make the best of it.' On the other hand, I hear it suggested that the treaty admits of a police-court construction, under which, by having recourse to a quibble and reading words into it, we would secure certain advantages—as much, for instance, as five cents, possibly, a head for each inhabitant!

"I take a wholly different view of the matter. I

insist upon it that the treaty is in no way 'a bad bargain'; it was, on the contrary, negotiated in a large cosmopolitan spirit, and, dealing with a world-issue, it is in every respect right, sound, and as it should be. The negotiators appreciated the fact that this was a world question, and, rising to an equality with it, small local interests and temporary advantages were eliminated from consideration. They so acted, and they were right in so acting. It was a large, statesmanlike, world-wide, all-time view.

SHOULD LIVE UP TO SPIRIT

"In this spirit they negotiated a treaty in which the United States was the principal factor and largest party in interest. The United States should now, in my judgment, live up to this—*not* bargain; that is a low huckstering term—but should live up to this international pact. It is essentially cosmopolitan, and should be dealt with in a cosmopolitan and not a ten-and-six spirit.

"That larger and higher aspiration dictated the terms of a treaty under which no nation was to have any advantage over any other nation, and the peoples of the world were to use this international thoroughfare on terms of absolute equality, one with another. There were to be no small preferences. What was law for one was to be law for another. And this was right!

"The enforcement of that law and this pact was then left with the United States. Such being the case, we should, in my judgment, be the very last people on earth to read into the treaty what is not plainly there, or to claim under it any exclusive or sordid benefit. We should say that we propose to enforce the rule of absolute

equality in the use of the canal on other nations; and, at the outset, we would set an example by enforcing it upon ourselves. Recognizing the fact that we are a republic and a great one, we should treat with contempt all huckstering suggestions. All the time and above all, we should bear in mind that this is not a tradesman deal, to be disposed of on a county court level. Let it be borne in mind that in every step now taken the United States is on trial; and, being so, should show a disposition to live, both in letter and spirit, up to the high standard which influenced the negotiators when the treaty was formulated. Not a bargain, it should be construed in no pettifogging or shop-keeper spirit. It speaks for itself—a world pact!

"If therefore, the people of the United States, represented by Congress, are not now prepared to think cosmopolitanly on this issue, they will simply show to an onlooking world that as a republic they are not equal to the occasion which is presented. The corner-grocery spirit will have asserted mastery. This, it seems to me, would be truly lamentable; but President Wilson is peculiarly well situated to emphasize the larger point of view."

MANNER OF SECURING TITLE

President Roosevelt said in this message of January 4, 1904, laying before Congress the Panama treaty:

"The proper position for the United States to assume in reference to this canal, and therefore to the Governments of the Isthmus, had been clearly set forth by Secretary Cass in 1858. In my annual message I have already quoted what Secretary Cass said; but I repeat

the quotation here, because the principle it states is fundamental:

> While the rights of sovereignty of the States occupying this region (Central America) should always be respected, we shall expect that these rights be exercised in a spirit befitting the occasion and the wants and circumstances that have arisen. Sovereignty has its duties as well as its rights, and none of these local Governments, even if administered with more regard to the just demands of other nations than they have been, would be permitted in a spirit of eastern isolation to close the gates of intercourse on the great highways of the world and justify the act by the pretension that these avenues of trade and travel belong to them and that they choose to shut them, or, what is almost equivalent, to encumber them with such unjust relations as would prevent their general use.

"The principle thus enunciated by Secretary Cass was sound then and it is sound now. The United States has taken the position that no other Government is to build the canal. In 1889, when France proposed to come to the aid of the French Panama Company by guaranteeing their bonds, the Senate of the United States in executive session, with only some three votes dissenting, passed a resolution, as follows:

> That the Government of the United States will look with serious concern and disapproval upon any connection of any European Government with the construction or control of any ship canal across the Isthmus of Darien or across Central America, and must regard any such connection or control as injurious to the just rights and interests of the United States and as a menace to their welfare.

"Under the Hay-Pauncefote treaty it was explicitly provided that the United States should control, police and protect the canal which was to be built, keeping it open for vessels of all nations on equal terms. The United States

thus assumed the position of guarantor of the canal and of its peaceful use by all the world."

Recently ex-President Roosevelt is reported as saying:

"For four hundred years there had been conversation about the need of the Panama Canal. The time for further conversation had passed, the time to translate words into deeds had come.

* * *

"It is only because the then [my] administration acted precisely as it did act that we now have the Panama Canal.

"The interests of the civilized people of the world demanded the construction of the canal. Events had shown that it could not be built by a private concern. We as a nation would not permit it to be built by a foreign Government. Therefore, we were in honor bound to build it ourselves.

* * *

"Panama declared her independence, her citizens acting with absolute unanimity. We promptly acknowledged her independence. She forthwith concluded with us a treaty substantially like that we had negotiated with Colombia for the same sum of money. We then immediately took the Canal Zone and began the construction of the canal.

* * *

"The case demanded immediate and decisive action. I took this action. Taking the action meant taking the Canal Zone and building the canal. Failure to take the action would have meant that the Canal Zone would not have been taken and that the canal would not have been built."

We took the Canal Zone under the principle of international eminent domain. That obligates the United States to manage the canal as a public utility. This precludes free transportation. Exemption of the public vessels of the Republic of Panama from the payment of tolls is merely commuted rent for leasehold rights. Exemption of the public vessels of the United States is in consideration of service in connection with protection and maintenance. Other traffic through the canal must receive the same treatment. The owner is entitled to collect in revenue an amount sufficient to cover operating expenses, interest, reserves and sinking fund. The United States need not be out a cent for the canal if it will apply business methods in its management. This puts the United States in a unique position to operate and manage the canal "*for the benefit of mankind on equal terms to all*" and thereby justify the manner in which it secured leasehold rights to the Canal Zone.

The United States has expended hundreds of millions of dollars in coast and harbor improvements to develop and promote commerce. There is no direct return to the national treasury for the expenditures incurred. The entire benefit is indirect—increased national prosperity.

Contrast this situation with the one presented by the Panama Canal. The expenditures incurred for the latter are to be amortized through charges to revenue from tolls and all operating expenses are similarly to be charged to revenue. The cost to the United States, in the long run, need not be anything. It need not cost the United States treasury a cent if the government will apply *gray matter* in the management of the canal.

The indirect commercial benefits to the United States will be real and substantial. Note the following from the *Evening Post* (New York):

"The curtailing of distances between our Atlantic and Pacific coasts—our coastwise trade—is so much larger than the saving in mileage from Europe or Africa to the west coast of the American continent that even with equal tolls our own shipping draws much the larger gain from the Canal. Tolls exemption would tend to emphasize the advantage by throwing the cost of canal maintenance on the traffic that profits least.

* * *

"For the Panama Canal to be a success and of real value to this country it must prove an economical route for coast-to-coast trade as well as a cheap route for trade between the eastern coast of the United States and the western coast of South America.

* * *

"For such trade the Panama Canal favors the American shipper by over 55 per cent. If this country cannot benefit with such a handicap, the Panama Canal must be a failure so far as the United States is concerned."

The United States has been granted a canal monopoly in perpetuity by Panama in the territory over which it is sovereign. The Nicaragua treaty submitted to the United States Senate for ratification secures the right to construct the Nicaragua canal on payment of $3,000,000. It is already suggested that we secure similar right to the Atrato route. In short, the United States aims at a transportation monopoly across the Isthmus connecting North and South America. Therefore, it is

obligated to adopt the public utility principle in its management; that is, "*for the benefit of mankind on equal terms to all.*"

The annual capacity of the Panama Canal is 80,000-000 tons. Its maximum capacity will not be reached in decades. Only nine per cent of the operating revenue was needed to defray operating expenses by the Suez Maritime Canal Company in 1911. This shows that there will be opportunity for exorbitant profits in the management of the Panama Canal after the liability is extinguished through a sinking fund. Therefore it is important that the Hay-Pauncefote treaty be continued unimpaired and that it should be given the meaning intended by John Hay.

Great Britain was given to understand and did understand that the shipping of her subjects (nationals) through the canal in the matter of charges and conditions would receive the same treatment as the shipping of citizens (nationals) of the United States. Thereto "we have pledged our faith as a nation, and that is the beginning and the end of all argument. * * *

"Our sole concern relates to our own honor, and that must be preserved inviolate. That it would be sullied in our own eyes and before the world we firmly believe a careful study of all phases of the subject * * * cannot fail to convince every honest mind. To all good citizens, then, we say, unhesitatingly:

"Remember the admonition of Washington to 'observe good faith and justice toward all nations' and stand by President Wilson in his courageous determination to

'redeem every obligation without quibble or hesitation'; stand by him, not necessarily because he is President, but because he is right."—*Harvey.*

The following newspaper clipping is *apropos*:

"The question for Congress to consider is, can we afford to make our policy as changeable as the figures of a kaleidoscope whenever it happens to suit our own interests? When we have throughout our entire history proclaimed to the world a policy founded on neutrality and equality, can we sanction any measure which favors equality when it helps us and utterly ignore and repudiate it when it may not prove to our interest?"

We will close this chapter with the following excerpts from Senator Root's memorable speeches in favor of the repeal of the tolls-exemption clause of the Panama Canal act:

"It is no petty question with England about tolls. This is a question whether the United States, put on its honor with the world, is going to make good the public declarations that reach back beyond our lives, whether the honor and good faith of the United States is as good as its bond, whether acute and subtle reasoning is to be applied to the terms of a treaty with England to destroy the just expectations of the world upon more than half a century of American professions, upon which we give no contract right, and there is no security but honor and good faith.

* * *

"*I knew something about this treaty. I knew what John Hay thought. I sat next him in the Cabinet of President McKinley while it was negotiated, and of President*

*Roosevelt when it was signed.* I was called in with Senator Spooner to help in the framing of the Panama treaty which makes obedience to this Hay-Pauncefote treaty a part of the stipulations under which we get our title. I negotiated the treaty with Colombia for the settlement and the removal of the cloud upon the title to the Isthmus of Panama and carried on the negotiations with England under which she gave her assent to the privileges that were given to Colombia in that treaty. I have had to have a full conception of what this treaty meant for now nearly thirteen years. I know what Mr. Hay felt and what he thought, and, * * * I speak for all the forbears that went before me in America and for all that shall come after me, for the honor and credit of our country, and for that alone. If we do not guard it, who shall?

* * *

"Our democracy has assumed a great duty and asserts a mighty power. I have hoped that all diplomacy would be made better, purer, nobler, placed on a higher plane because America was a democracy. I believe it has been; I believe that during all our history the right-thinking, the peace-loving, the justice-loving people of America have sweetened and ennobled and elevated the intercourse of nations with each other; and I believe that now is a great opportunity for another step forward in that beneficent and noble purpose for civilization that goes far beyond and rises far above the mere question of tolls or a mere question with England. It is the conduct of our Nation in conformity with the highest principles of ethics and the highest dictates of that religion which aims to make the men of all the races of the earth brothers in the end."

## CHAPTER III

## *The Financial Aspects of Tolls-Exemption*

In the proper consideration of this aspect of the question, we must determine what traffic through the canal is exempt from payment of tolls under existing treaties. The public vessels of the United States through the canal are exempt from the payment of tolls by understanding with Great Britain. Article XIX of the treaty with Panama states: "The Government of the Republic of Panama shall have the right to transport over the canal its vessels and its troops and munitions of war in such vessels at all times without paying charges of any kind." Great Britain has conceded the right of the United States to enter into a treaty with Colombia exempting their public vessels from the payment of tolls, if thereby it will get a clear title to the Canal Zone. No other traffic through the canal is exempt from payment of tolls through treaty stipulation. None can be made exempt by legal enactment.

The Panama Canal act provides:

SECT. 5. "That the President is hereby authorized to prescribe and from time to time change the tolls that shall be levied by the Government of the United States for the use of the Panama Canal: *Provided*, That no tolls, when prescribed as above, shall be changed, unless six months' notice thereof shall have been given by the

President by proclamation. No tolls shall be levied upon vessels engaged in the coastwise trade of the United States.

* * *

"Tolls may be based upon gross or net registered tonnage, displacement tonnage, or otherwise, and may be based on one form of tonnage for warships and another for ships of commerce. The rate of tolls may be lower upon vessels in ballast than upon vessels carrying passengers or cargo. When based upon net registered tonnage for ships of commerce, the tolls shall not exceed one dollar and twenty-five cents per net registered ton, nor be less, other than for vessels of the United States and its citizens, than the estimated proportionate cost of the actual maintenance and operation of the canal. If the tolls shall not be based upon net registered tonnage, they shall not exceed the equivalent of one dollar and twenty-five cents per net registered ton as nearly as the same may be determined, nor be less than the equivalent of seventy-five cents per net registered ton. The toll for each passenger shall not be more than one dollar and fifty cents. The President is authorized to make and from time to time to amend regulations governing the operation of the Panama Canal, and the passage and control of vessels through the same or any part thereof, including the locks and approaches thereto, and all rules and regulations affecting pilots and pilotage in the canal or the approaches thereto through the adjacent waters."

The foregoing is construed by Senator Root as follows:

"The President is authorized to impose tolls not

exceeding one dollar and twenty-five cents per net registered ton, except for vessels of the United States and its citizens, and not less than seventy-five cents per net registered ton, and is prohibited from imposing any tolls upon vessels engaged in the coastwise trade of the United States. He is required to impose tolls of at least seventy-five cents per net registered ton upon all foreign vessels. He is authorized to impose no tolls upon any American vessel, and is required to impose no tolls upon American vessels engaged in the coastwise trade."

Objections are made by Sir Edward Grey to the provisions of the Panama Canal act as given above—first, because no tolls are to be levied upon ships engaged in the coastwise trade of the United States; second, because a discretion appears to be given to the President to discriminate in fixing tolls in favor of ships belonging to the United States and its citizens as against foreign ships.

Sir Edward Grey states:

" * * * The Panama Canal act in its present form conflicts with the treaty rights to which His Majesty's Government maintain they are entitled.

"Under Section 5 of the act the President is given, within certain defined limits, the right to fix the tolls, but no tolls are to be levied upon ships engaged in the coastwise trade of the United States, and the tolls, when based upon net registered tonnage for ships of commerce, are not to exceed one dollar and twenty-five cents per net registered ton, nor be less, other than for vessels of the United States and its citizens, than the estimated proportionate cost of the actual maintenance and operation of the canal. * * *

"The effect of these provisions is that vessels engaged in the coastwise trade will contribute nothing to the upkeep of the canal. * * * Again, in the cases where tolls are levied, the tolls in the case of ships belonging to the United States and its citizens may be fixed at a lower rate than in the case of foreign ships, and may be less than the estimated proportionate cost of the actual maintenance and operation of the canal.

"These provisions (1) clearly conflict with the rule embodied in the principle established in Article VIII of the Clayton-Bulwer treaty of equal treatment for British and United States ships, and (2) would enable tolls to be fixed which would not be just and equitable, and would therefore not comply with Rule 1 of Article III of the Hay-Pauncefote treaty.

"It has been argued that as the coastwise trade of the United States is confined by law to United States vessels, the exemption of vessels engaged in it from the payment of tolls cannot injure the interests of foreign nations. It is clear, however, that the interests of foreign nations will be seriously injured in two material respects.

"In the first place the exemption will result in the cost of the working of the canal being borne wholly by foreign-going vessels, and on such vessels, therefore, will fall the whole burden of raising the revenue necessary to cover the cost of working and maintaining the canal. The possibility, therefore, of fixing the toll on such vessels at a lower figure than one dollar and twenty-five cents per ton, or of reducing the rate below that figure at some future time will be considerably lessened by the exemption.

"In the second place, the exemption will, in the

opinion of His Majesty's Government, be a violation of the equal treatment secured by the treaty, as it will put the '*coastwise trade*' in a preferential position as regards other shipping. Coastwise trade cannot be circumscribed so completely that benefits conferred upon it will not affect vessels engaged in the foreign trade. To take an example, if cargo intended for a United States port beyond the canal, either from east or west, and shipped on board a foreign ship could be sent to its destination more cheaply through the operation of the proposed exemption, by being landed at a United States port before reaching the canal, and then sent on as coastwise trade, shippers would benefit by adopting this course in preference to sending the goods direct to their destination through the canal on board the foreign ship.

"Again, although certain privileges are granted to vessels engaged in an exclusively coastwise trade, His Majesty's Government are given to understand that there is nothing in the laws of the United States which prevents any United States ship from combining foreign commerce with coastwise trade, and consequently from entering into direct competition with foreign vessels while remaining '*prima facie*' entitled to the privilege of free passage through the canal. Moreover, any restriction which may be deemed to be now applicable might at any time be removed by legislation or even perhaps by mere changes in the regulations.

"In these and in other ways foreign shipping would be seriously handicapped, and any adverse result would fall more severely on British shipping than on that of any other nationality.

"The volume of British shipping which will use the canal will in all probability be very large. Its opening will shorten by many thousands of miles the waterways between England and other portions of the British Empire, and if on the one hand it is important to the United States to encourage its mercantile marine and establish competition between coastwise traffic and transcontinental railways, it is equally important to Great Britain to secure to its shipping that just and impartial treatment to which it is entitled by treaty and in return for a promise of which it surrendered the rights which it held under the earlier convention."

The Hay-Pauncefote treaty provides that tolls shall be "*just and equitable.*" Sir Edward Grey pointedly observes:

"The purpose of these words was to limit the tolls to the amount representing the fair value of the services rendered, *i. e.*, to the interest on the capital expended and the cost of the operation and maintenance of the canal. Unless the whole volume of shipping which passes through the canal, which benefits all equally by its services, is taken into account, there are no means of determining whether the tolls chargeable upon a vessel represent that vessel's fair proportion of the current expenditure properly chargeable against the canal; that is to say, interest on the capital expended in construction and the cost of operation and maintenance. If any classes of vessels are exempted from tolls in such a way that no receipts from such ships are taken into account in the income of the canal, there is no guaranty that the vessels upon which tolls are being levied are not being made to bear more than their

fair share of the upkeep. Apart altogether, therefore, from the provision in Rule 1 about equality of treatment for all nations, the stipulation that the tolls shall be just and equitable, when rightly understood, entitles His Majesty's Government to demand, on behalf of British shipping, that all vessels passing through the canal, whatever their flag or their character, shall be taken into account in fixing the amount of the tolls.

"The result is that any system by which particular vessels or classes of vessels were exempted from the payment of tolls would not comply with the stipulations of the treaty that the canal should be open on terms on entire equality, and that the charges should be just and equitable."

We will now proceed to show that the foregoing statements by Sir Edward Grey are entirely sound. To do this we ask the reader to *note* the language used in the last sentence of Section 1, Article III, of the Hay-Pauncefote treaty; namely, "*Such conditions and charges of traffic shall be just and equitable.*"

John Hay states: "One amendment proposed by Lord Lansdowne was regarded by President McKinley as so entirely reasonable that it was agreed to without discussion. This was the insertion at the end of Clause 1 of Article III of the words: '*Such conditions and charges of traffic shall be just and equitable.*' "

How are charges that are *just and equitable*, in this instance, determined? The Panama Canal is an international utility—a public utility. So considered, the foregoing question is easily answered from a financial standpoint.

The common law of England and America, the public policy especially of America at the very time this treaty was being negotiated, enforced with unsparing rigor the duty of equal charges and equal service by all public utilities to all the public which they were to serve. Discrimination is outlawed. All must pay the same charge for identical units of service.

The general principles underlying charges that are just and equitable are no longer subject matter for debate. They have been established by court decisions—state and national, including the United States Supreme Court. There is difference of opinion as to what may be included in the investment account on which a reasonable return must be allowed. In the case of the Panama Canal, the amount of the *bona fide* investment is easily determined. Therefore, where difference of opinion exists in the regulation of public utilities none can exist here.

The difference of opinion in this (tolls) case is in regard to rates. Must American shippers pay the same rate as foreign shippers for identical units of traffic?

The principles as established in the regulation of national, state and municipal utilities compel all to pay the same rate for an identical unit of service. The same principle applies to the Panama Canal, which is an international utility whereof the United States is merely the trustee as far as concerns the fixing of tolls. It cannot honorably apply one principle in the regulation of national, state and municipal utilities and another principle, in short, the monopoly principle, in the management of the Panama Canal.

A rate that is *just and equitable* provides for operating

expenses, interest on the investment and a reasonable amount for amortization of the principle. This fixes the amount to be collected from the users of the canal over a normal business period. The volume of traffic then determines the rate to be charged. The rate is a resultant of the amount to be collected to make the canal commercially self-sustaining and the volume of traffic. A rate determined in this way is *just and equitable* and it must be determined in this way to be *just and equitable*. Exempting any traffic from the payment of its proportionate share of the tolls means that the traffic not exempted from payment must contribute through a higher rate the amount which should have been levied on the traffic relieved from payment.

The tolls levied under the Panama Canal act cannot be made *just and equitable* as these terms are understood in the regulation of national, state and municipal utilities. The whole outlay must be levied on the traffic as soon as the volume of traffic permits. The act requires that no tolls be levied on our coastwise traffic and permits our foreign commerce to be relieved from any payment whatsoever. The entire outlay, therefore, must be levied on the remainder of the traffic through the canal, thereby imposing thereon a rate that is higher than one that is *just and equitable*—the rate assured to non-nationals by the Hay-Pauncefote treaty.

The United States need not assess taxpayers with canal construction and operating expenses if it manage the canal as a business enterprise. If it has already assessed taxpayers therefor, it has failed in the proper

exercise of its function as trustee of this international utility and should immediately employ an expert accountant for the purpose of introducing business methods into the management of the canal. It is not enough that the construction department be efficient. The accounting department should keep the records so that the entire outlay can be charged to revenue as rapidly as income permits. The amounts charged to taxes should be treated in the canal accounts as a suspense-debit and the United States treasury should be reimbursed as soon as the debit can be extinguished from surplus revenue.

It is not necessary in a long-period project such as the Panama Canal that revenue exceed operating expenses and interest on the investment in its initial stages for the undertaking to be commercially self-supporting. It is only necessary that in a normal business period (say twenty-five years) the revenue exceed total operating outlay and interest on investment. The deficit of the initial period is merely a suspense-debit to be amortized when revenue exceeds operating outlay. Thus viewed, the Panama Canal will be commercially self-sustaining from the beginning, if the history of the Suez Canal and similar projects are any criterion.

The management of the Panama Canal is similar to that of a transportation company. A railway through new territory will have a deficit period in which traffic is developed. This deficit with accrued interest thereon is extinguished by being charged to surplus revenue after traffic has been developed and the company has revenue in excess of the annual operating expenses and interest charges.

This is a birds'-eye-view of the Panama Canal situation today. The outlook is for a deficit period of about ten years. Thereafter there will be an annual increase in surplus for an indefinite period if a reasonable rate is charged the users of the canal. During this period, the earlier deficit can be extinguished by being charged to surplus revenue. If the canal is properly managed, there will be no indirect subsidy to foreign shipping, as the canal will be a commercially self-supporting enterprise—kindergarten financial arguments in the congressional debates on the repeal of the tolls-exemption clause of the Panama Canal act to the contrary notwithstanding.

Hence, it is evident that the United States can in due course levy the entire Panama Canal expenditures including interest and investment on the traffic. The Hay-Pauncefote treaty permits it. A charge that is *just and equitable* requires it. No traffic not exempted by reason of securing leasehold rights to the Canal Zone can be relieved from contributing its proportionate share to this end. The total traffic through the canal, less the amount exempted in securing leasehold rights, including our public vessels, fixes the amount of traffic on which the amount to be levied must be assessed during a normal business period. The rate is the resultant. If levied in this way, it is *just and equitable.*

Just what kind of discrimination is alleged against the Panama Canal act. Let us illustrate the principle thereof. Assume a railway enterprise that needs an income of $150,000 a year for operating expenses and a reasonable return on its investment. If there are 1,500 users, each must pay $100. All use the facility the same

amount and each user pays his porportionate share of the needed revenue. The revenue of the company is $150,000. The charge is just and equitable. A railway is a public utility. Let it grant free transportation to 300 theretofore users who paid their proportionate share. Only 1,200 users of the facility thereafter pay. The company still needs $150,000 income a year. The charge thereafter is $125 instead of $100 to those compelled to pay. In short, free transportation to some means a higher charge to the remainder—a charge that is not *just and equitable*. This is the kind of discrimination complained of by Great Britain. This is the Panama Canal tolls question in a nutshell.

What amount of revenue is needed to make the Panama Canal commercially self-supporting? The Isthmian Canal Commission report says:

"The annual revenue ultimately required to make the canal commercially self-supporting will be about $19,500,000. It is estimated that the operating and maintenance expenses will amount to $3,500,000 yearly, and that $500,000 will be required for sanitation and for the government of the Zone. The interest on $375,000,000 at three per cent per annum amounts to $11,250,000, and the treaty with Panama guarantees an annuity, beginning in 1913, of $250,000 to the Republic of Panama. The sum of these four items is $15,500,000. If to this there be added one per cent per annum on $375,000,000 to accumulate a sinking fund to amortize the investment, the total expenses will be $19,250,000."

The Isthmian Canal Commission report is somewhat out of date as to cost of construction. If cost is

$400,000,000, as is now claimed, the annual revenue needed will be approximately $20,000,000. Will the income of the Panama Canal exceed this amount if conducted as a business enterprise?

The above-mentioned report states:

"The investigation of the traffic available for the use of the canal led to the conclusion that about 10,500,000 tons net register of shipping will pass through the canal during the early years of its operation. The rate at which the Suez Canal tonnage and the commerce of the world is increasing indicates that an increase of at least sixty per cent in the traffic of the Panama Canal may be expected during the decade 1915–25. It is thus probable that there will be 17,000,000 tons of shipping using the canal during 1925. An increase of sixty per cent during the second decade of the canal's operation would bring the traffic up to 27,000,000 net register tons at the end of twenty years. *The estimates are believed to be conservative.* If the traffic of the Panama Canal shall be equal to these estimates, it will be possible to secure from moderate tolls enough revenues to enable the canal to be commercially self-supporting."

It is thus evident that the income from the Panama Canal will be sufficient to make it commercially self-supporting if it is managed as a business enterprise by competent officials.

The foregoing is germane only if the canal can be made commercially self-supporting. The history of the Suez Canal will throw light on the subject, and the Isthmian Canal Commission report will give us the

best information available. The text of this report was written by Emory R. Johnson—one of the greatest transportation experts.

The Suez Maritime Canal Company is the owner and operator of this canal. Its cost of construction was about $125,000,000 to 1912.

Condensed income statement for 1911:

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|---|---|
| Operating revenues | $27,600,000 |
| Operating expenses | 2,700,000 |
| Net operating income | $24,900,000 |

This amount ($24,900,000) was available for reserves, interest and dividends—and note that the investment was only about $125,000,000.

The United States needs about $20,000,000 a year for a period of say twenty-five years to conduct the canal as a business enterprise. This will make a total of $500,000,000 for the period. It is believed that the revenue during the first year will be about $10,000,000 and that it need not be less than $30,000,000 the twenty-fifth year. That would be an average annual income of $20,000,000, or the total of $500,000,000 for the period.

Now, grant free transportation to our coastwise traffic and what happens? The amount of income needed for the period is still $500,000,000. If the average yearly revenue from coastwise traffic would have been $4,000,000, the total would be $100,000,000. Other users would have to pay this amount in a higher rate. The resulting rate would not be just and equitable and would be established

in violation of the Hay-Pauncefote treaty. This is the claim of Great Britain. The claim is sustained.

The United States needs about $20,000,000 a year in revenue from the Panama Canal to cover interest, all operating charges, the annuity to Panama and a sinking fund charge of $4,000,000. Only $20,000,000 a year is needed to conduct it as a business enterprise. The income of the Suez Canal is now considerably in excess of this amount. The revenues of the Panama Canal will exceed the present income of the Suez Maritime Canal Company in twenty years, if conducted on business principles.

It seems to be the adopted policy of the United States to make the canal commercially self-supporting and to extinguish its liability therefor by an amortization charge to revenue. Business prudence and political wisdom demand that it shall be made commercially self-supporting, provided revenues large enough to enable the canal to carry itself can be secured without unwisely restricting traffic. Expert opinion is to the effect that this can be done.

Ex-President Taft has clearly stated the policy that the United States should pursue in managing the canal; namely:

"I believe that the cost of such a Government work as the Panama Canal ought to be imposed gradually but certainly upon the trade which it creates and makes possible. So far as we can, consistent with the development of the world's trade through the canal and the benefit which it is intended to secure to the east and west coastwise trade, we ought to labor to secure from the canal

tolls a sufficient amount ultimately to meet the debt which we have assumed, and to pay the interest."

The Panama Canal act is in harmony therewith. It merely needs good management and up-to-date accounting.

In the fixing of tolls, the President is vested with some discretion. A maximum and a minimum rate are fixed for foreign commerce using the canal. The amount imposed on the traffic must cover carrying charges, as that is understood in modern business, as soon as it can be done without exceeding the maximum rate fixed by the canal act. The Panama Canal act is thus in harmony with the foregoing view expressed by ex-President Taft.

The policy that the United States should adopt in the management of the Panama Canal is expressed as follows by Professor Johnson:

"The United States should adhere to business principles in the management of the Panama Canal. The Government needs to guard its revenues carefully. Present demands on the general budget are heavy and are certain to be larger. Taxes must necessarily increase. Those who directly benefit from using the canal, rather than the general tax payers, ought to pay the expenses of operating and carrying the Panama Canal commercially."

The following statement by Professor Johnson is now *apropos:*

"In considering the effect of exempting the coastwise shipowners from toll payments it is possibly well to bear in mind that the charges that have been fixed by the President for the use of the canal one dollar and

twenty cents for each one hundred cubic feet of the earning capacity of vessels, with a reduction of forty per cent in the rate for vessels without passengers or cargo—are not the highest rates that might have been imposed without restricting traffic, nor are the rates such that higher charges would have lessened the revenues from the canal. The tolls are neither all the traffic would bear, nor have they been fixed with a view to securing maximum possible revenues.

"It is obvious that with a given rate of tolls the canal revenues will be larger if all vessels using the canal are charged tolls, and will be smaller if any class of vessels, as the American coastwise shipping, is exempted from the charges.

"It is likewise self-evident that if it be desired to secure an income of a definite amount, as, for example, revenues that will cover outlays for operation, maintenance, interest and amortization—revenues that will make the canal commercially self-supporting—the rate of tolls must be increased proportionately with any reduction of the tonnage resulting from the exemption of any class or classes of shipping from the payment of the charges.

"These statements are, of course, mere truisms. There will be nothing new or unusual about the Panama Canal finances. If the canal does not support itself, the taxpayers must support it. The amount required to meet the current expenses and capital costs of the canal can be derived only from the tolls paid by those who use the waterway or from taxes paid by the public who own the canal; and, as regards the income from tolls, the sum received must be affected both by the rate of charges

and by the share of the tonnage that is subject to or exempted from the charges.

"It is estimated that $19,250,000 will be required annually to make the canal commercially self-supporting. This total is made up of $3,500,000 for operating and maintenance expenses, $500,000 for sanitation and zone government, $250,000 which is the annuity payable to Panama under the treaty of 1903, $11,250,000 to pay three per cent on the $375,000,000 invested in the canal, and $3,750,000 for an amortization fund of one per cent per annum upon the cost of the canal.

"It has been ascertained by a detailed study of the traffic that might advantageously use the Panama Canal and of the rate at which that commerce is increasing that, during the first year or two of the canal's operation, that is in 1915, the ships passing through the canal will have an aggregate net tonnage of about 10,500,000 tons. Of this initial tonnage about 1,000,000 net tons will consist of shipping employed in the trade between the two seaboards of the United States. The evidence as to the past rate of growth of the world's commerce justifies the estimate that by the end of the first decade, that is, in 1925, the total net tonnage of the shipping passing through the canal annually will be about 17,000,000 tons, of which at least 2,000,000 tons will be contributed by the coastwise shipping."

It is likely that growth in the amount of the traffic that will be shipped through the canal will continue in later decades in even larger volume than during the first decade. This points to the possibility of making the canal commercially self-supporting.

Professor Johnson says in another place:

"Tolls are to be levied and collected at Panama presumably to pay the expenses for running and maintaining the canal and for meeting the interest charges on the funds invested in the canal; and it is to be expected that it will be the policy of the United States to make the canal commercially self-supporting, if the traffic is large enough to secure the requisite revenues without unduly restricting the usefulness of the waterway. It will not be the policy of the United States to obtain profits in excess of the revenues required to meet operating, maintenance, interest, and amortization charges; but, if the traffic proves to be as large as it seems probable that it will be, the policy of the United States will doubtless be to have the canal carry itself commercially—to limit the canal expenses borne by the general taxpayers of the United States to the military and naval outlays required for the defense of the canal and for the maintenance, at the isthmus, of forts and naval bases.

"If it shall be, as it ought to be, the policy of the Government to make the canal commercially self-supporting, it is obvious that the rate of tolls imposed must be affected by the tonnage upon which the charges are levied; and that, if the toll-bearing tonnage is reduced by the exemption of the large volume of shipping owned by the individuals and corporations engaged in the coastwise trade, the rate of charges payable by the owners of American ships in the foreign trade and by the citizens owning vessels under foreign flags must be higher than the rate would be if all vessels using the canal were required to pay tolls."

Ex-President Taft says:

"The tolls have been fixed on the canal for all the world on the assumption that the coastwise traffic is to pay tolls. Our giving it immunity from tolls does not, in our judgment, affect the traffic of the other countries in any other way than it would affect it if we had voted a subsidy equal to the tolls remitted to our ships."

Why insist on a method of granting a subsidy to our coastwise shipping claimed to be repugnant to the Hay-Pauncefote treaty if no pecuniary advantage is aimed at. If no part of the revenue that would have been contributed by our coastwise shipping is to be levied against other shipping through the canal, it is not clear why this method of granting the subsidy should be so stubbornly insisted on. Something other than method of granting a subsidy is aimed at. Monopoly power in the management of the Panama Canal is the goal of champions of tolls-exemption.

Could it have been intended as a permanent policy to estimate the amount of our coastwise shipping through the canal and to consider it in fixing the rate to be charged other shipping? There is no evidence that that was to be or could be the policy of the United States. There is evidence that it was to be the policy of the United States to treat our coastwise shipping as we treat our public vessels through the canal.

The question arises as to whether the canal can be made commercially self-supporting under those conditions. It seems probable. It will take a longer development (initial or deficit) period and thus a deferred date when the whole liability incurred in construction can be

amortized through charges to revenue. It would merely defer the date when the canal would become commercially self-supporting. Therefore, the necessity of proper business and accounting methods from the beginning in order that all traffic through the canal beginning with the first cargo shall contribute its proportionate share to the upkeep of the canal and to the amount needed to amortize the liability incurred in construction.

The United States is builder, owner and manager of the Panama Canal, an international waterway. It should manage and control it as a trust in the interest of civilization. That she has obligated herself to do this is shown in State Department and other public documents from 1826 to the adoption of the Hay-Pauncefote treaty.

Civilization will cheerfully allow the United States (1) operating expenses; (2) interest on investment; (3) a reasonable amortization charge to extinguish the $400,000,000 liability incurred in construction; (4) a reasonable reserve for betterment, so that in the future we may have an up-to-date canal with a cost of construction higher than the initial $400,000,000. Yet, our jingoes are not satisfied. They aim at the exercise of monopoly power.

No nation is honorable enough to be entrusted with or to have the right to exercise monopoly power over an international highway such as the Panama Canal. The fleecing of the world's commerce by the Suez Maritime Canal Company is appalling. That history should find no parallel in the case of the Panama Canal. The Hay-Pauncefote treaty prohibits it. The Suez Canal treaty does

not. England has protested and her protest is in the interest of collective civilization. The fixing of the charge that shall be *just and equitable* should not be left to the discretion of the United States.

Stated a little differently, the United States, which is trying to eliminate—yea, is pledged to eliminate—the principle of private monopoly in the national domain, is now attempting to establish the monopoly principle in the management of the Panama Canal. It is trying to put itself into a position to fix charges that are other than "*just* and *equitable*," the charges pledged in the Hay-Pauncefote treaty and in the Panama Canal treaty. The business situation points to large monopoly profits after traffic has been developed. When the debt is extinguished by amortization, the income can, by adjusting the rate, be made to be three to six times the total outlay for management.

Monopoly power without a sovereign is dangerous—intolerable, even though exercised by the United States. The beam in John Bull's eye has its counterpart in the mote in Uncle Sam's eye.

It is of the utmost importance to civilization that England shall not waive the rights guaranteed to her in the Hay-Pauncefote treaty, and that she compel their recognition by the United States. That will prevent monopoly power, a power which is intolerable when exercised without a sovereign, and the United States recognizes none.

The United States ought to be too large-minded, too self-respecting, too decent to seek monopoly power in the management of the Panama Canal. The welfare of

collective civilization requires that the attempt fail and that England's contention prevail.

Let us picture to ourselves the situation through operating statistics:

INCOME STATEMENT OF THE SUEZ CANAL FOR 1911

| | |
|---|---|
| Operating revenues | $27,600,000 |
| Operating expenses | 2,700,000 |
| Operating income | 24,900,000 |
| Other outlays | $10,700,000 |
| Available for dividends | $14,200,000 |
| Dividend declared | 33 per cent |

The picture as it should have been:

| | |
|---|---|
| Investment | $125,000,000 |
| Reasonable return on investment—6's | $7,500,000 |
| Operating expenses | 2,700,000 |
| Additional charge needed for safety | 3,600,000 |
| Total needed | $13,800,000 |
| Revenue in 1911 | $27,600,000 |
| Revenue needed | 13,800,000 |

One-half the rate of toll actually levied would have yielded the $13,800,000 needed to conduct the canal as a business enterprise. The world's commerce was charged

exorbitant rates through the Suez Canal. This should never be paralleled in the management of the Panama Canal.

Let us now imagine another picture—the Panama Canal in 1975:

ABRIDGED CAPITAL ACCOUNT

| | |
|---|---|
| Cost of construction | $400,000,000 |
| Betterment charged to revenue (assumed) | 100,000,000 |
| Total cost | $500,000,000 |

The investment was amortized through charges to revenue. Money cost to the United States in 1975—*nothing.*

ABRIDGED INCOME STATEMENT

| | |
|---|---|
| Operating revenues (conservative) | $38,000,000 |
| Operating expenses (liberal) | 8,000,000 |
| Monopoly profit | $30,000,000 |

To prevent the possibility of such a condition as is pictured in the abridged income statement given above, England has protested against the exemption of our coastwise shipping through the canal from the payment of tolls. Her protest was wise and timely.

The state (we use the word in a technical sense) acts on the basis of living forever. This is an axiom of political science. England's protest is in harmony with

this principle. English statesmen are far-seeing. They see pictures similar to the ones we presented above.

The monopoly power which the United States seeks to establish in the management of the Panama Canal ought not to be acquiesced in in the interest of social justice and collective civilization. England's position is correct. The Hay-Pauncefote treaty should be preserved unimpaired. Its meaning is plain. John Hay, the soul of honor, has told us what it means.

Senator Root says:

"We know from many sources what Mr. Hay's views were. The Senator from Connecticut (Mr. McLean) has read to you a statement of them, authentic, made about the time of the treaty, at the time the treaty with Panama was under consideration."

Here is what Mr. Hay says:

"All means all. The treaty was not so long that we could not have made room for the word 'other' if we had understood that it belonged there. 'All nations' means all nations, and the United States is certainly a nation."

"That was the understanding between yourself and Lord Pauncefote when you and he made the treaty?" I pursued.

"It certainly was," he replied. "*It was the understanding of both Governments, and I have no doubt that the Senate realized that in ratifying the second treaty without such an amendment it was committing us to the principle of giving all friendly nations equal privileges in the canal with ourselves. That is our golden rule.*"

"A decent respect to the opinions of mankind" should impel the United States to manage the Panama Canal

as a business enterprise; that is, in entire accord with the principles established in the regulation of public utilities. If so, it will voluntarily manage the canal as the Hay-Pauncefote treaty obligates it to do—*even that without the intervention of a treaty.* It will assume different standpoints—one as owner, the other as sovereign. As owner, it will manage the canal as a business enterprise. As a self-respecting sovereign, it will see to it that as owner it manages it as a public utility and levies the revenue (*no more and no less*) needed to make the canal commercially self-supporting.

Again looms large the pivotal sentence of the Hay-Pauncefote treaty; namely, "*Such conditions and charges of traffic shall be just and equitable.*" A proper construction of this sentence precludes free transportation through the canal except the traffic named in the contract (Panama Canal treaty) to secure leasehold rights to the Canal Zone. *Just and equitable* is a well-defined expression in the literature which deals with the regulation of public utilities. It precludes favoritism. It requires equal opportunity for all in the use of this international waterway. It requires that the same toll be charged for equal units of service. The direct commercial benefits of the owner must come from the fixing of an adequate rate for the use of the facility and the collection of sufficient revenue to make it commercially self-supporting.

The import, the significance, in short, the full meaning of the foregoing sentence from the Hay-Pauncefote treaty was not brought out in the recent congressional debate on the tolls-exemption repeal. All statements are either inadequate or incorrect. Viewed from the standpoint

of the principles developed in the regulation of national, state and local utilities, the sentence entitles the United States to fix a rate of toll so that it will be re-imbursed for all expenditures incurred, including interest during construction and deficits during the period in which traffic is developed. Note the following from an opinion by Justice Miller of the New York Court of Appeals:

"I define 'going value' for rate purposes as * * * the amount equal to the deficiency of net earnings below a fair return on the actual investment due solely to the time and expenditures reasonably necessary and proper to the development of the business and property."

Deficits during a development period can be amortized after traffic is developed and revenues exceed annual outlay. The United States, as owner of the Panama Canal, is entitled to a return on it as a public utility, collected under the restrictions established for such a utility.

The limitations imposed on the United States by the Hay-Pauncefote treaty are merely commercial. Its investment interest is safeguarded by being entitled to impose a rate of toll on the traffic that is *just and equitable* and that is a rate of toll which will give a reasonable return on the investment.

Let the United States treat the tolls problem of the Panama Canal in harmony with the Golden Rule and not view it in the spirit of a refined financial brigand of which there is regretfully some evidence. If it does so, it will ask the Hague Court to appoint an auditing committee (advisory) to represent the interests of collective civilization in this international waterway. Such a committee

would safeguard the reputation of the United States and assist the President in fixing rates, within the discretionary limit fixed by the Panama Canal act, that would be just and equitable to all parties in interest. This done, every investment interest of the United States would be safeguarded. The commercial interests of collective civilization would be protected by fair rates. Lastly, the United States would, by such a creditable act, give the world's peace movement increased momentum and would dedicate the canal "*to the use of mankind on equal terms to all*" as she has obligated herself to do by irrevocable treaty obligations.

# APPENDICES

## CLAYTON–BULWER TREATY OF APRIL, 1850

The United States of America and Her Britannic Majesty, being desirous of consolidating the relations of amity which so happily subsist between them, by setting forth and fixing in a convention their views and intentions with reference to any means of communication by ship-canal which may be constructed between the Atlantic and Pacific Oceans by the way of the river San Juan de Nicaragua and either or both of the lakes of Nicaragua or Managua, to any port or place on the Pacific Ocean, the President of the United States has conferred full powers on John M. Clayton, Secretary of State of the United States, and Her Britannic Majesty on the Right Honorable Sir Henry Lytton Bulwer, a member of Her Majesty's most honorable privy council, knight commander of the most honorable Order of the Bath, and envoy extraordinary and minister plenipotentiary of Her Britannic Majesty to the United States, for the aforesaid purpose; and the said plenipotentiaries having exchanged their full powers, which were found to be in proper form, have agreed to the following articles:

ARTICLE I

The Governments of the United States and Great Britain hereby declare that neither the one nor the other will ever obtain or maintain for itself any exclusive control over the said ship canal; agreeing that neither will ever erect or maintain any fortifications commanding the same

or in the vicinity thereof, or occupy, or fortify, or colonize, or assume, or exercise any dominion over Nicaragua, Costa Rica, the Mosquito coast, or any part of Central America; nor will either make use of any protection which either affords or may afford, or any alliance which either has or may have to or with any state or people, for the purpose of erecting or maintaining any such fortifications, or of occupying, fortifying, or colonizing Nicaragua, Costa Rica, the Mosquito coast, or any part of Central America, or of assuming or exercising dominion over the same; nor will the United States or Great Britain take advantage of any intimacy, or use any alliance, connection or influence that either may possess with any State or Government through whose territory the said canal may pass, for the purpose of acquiring or holding, directly or indirectly, for the citizens or subjects of the one, any rights or advantages in regard to commerce or navigation through the said canal which shall not be offered on the same terms to the citizens or subjects of the other.

ARTICLE II

Vessels of the United States or Great Britain traversing the said canal shall, in case of war between the contracting parties, be exempted from blockade, detention or capture by either of the belligerents; and this provision shall extend to such a distance from the two ends of the said canal as may hereafter be found expedient to establish.

ARTICLE III

In order to secure the construction of the said canal, the contracting parties engage that if any such canal shall

be undertaken upon fair and equitable terms by any parties having the authority of the local Government or Governments through whose territory the same may pass, then the persons employed in making the said canal, and their property used, or to be used, for that object, shall be protected, from the commencement of the said canal to its completion, by the Governments of the United States and Great Britain, from unjust detention, confiscation, seizure or any violence whatsoever.

ARTICLE IV

The contracting parties will use whatever influence they respectively exercise with any State, States or Governments possessing or claiming to possess any jurisdiction or right over the territory which the said canal shall traverse, or which shall be near the waters applicable thereto, in order to induce such States or Governments to facilitate the construction of the said canal by every means in their power. And furthermore, the United States and Great Britain agree to use their good offices, wherever or however it may be most expedient, in order to procure the establishment of two free ports, one at each end of the said canal.

ARTICLE V

The contracting parties further engage, that when the said canal shall have been completed, they will protect it from interruption, seizure or unjust confiscation, and that they will guarantee the neutrality thereof, so that the said canal may forever be open and free, and the capital invested therein secure. Nevertheless, the Governments

of the United States and Great Britain, in according their protection to the construction of the said canal, and guaranteeing its neutrality and security when completed, always understand that this protection and guarantee are granted conditionally, and may be withdrawn by both Governments, or either Government, if both Governments, or either Government, should deem that the persons or company undertaking or managing the same adopt or establish such regulations concerning the traffic thereupon as are contrary to the spirit and intention of this convention, either by making unfair discriminations in favor of the commerce of one of the contracting parties over the commerce of the other, or by imposing oppressive exactions or unreasonable tolls upon the passengers, vessels, goods, wares, merchandise or other articles. Neither party, however, shall withdraw the aforesaid protection and guarantee without first giving six months' notice to the other.

ARTICLE VI

The contracting parties in this convention engage to invite every State with which both or either have friendly intercourse to enter into stipulations with them similar to those which they have entered into with each other, to the end that all other States may share in the honor and advantage of having contributed to a work of such general interest and importance as the canal herein contemplated. And the contracting parties likewise agree that each shall enter into treaty stipulations with such of the Central American States as they may deem advisable, for the purpose of more effectually carrying out the great design

of this convention, namely, that of constructing and maintaining the said canal as a ship communication between the two oceans for the benefit of mankind, on equal terms to all, and of protecting the same; and they also agree that the good offices of either shall be employed, when requested by the other, in aiding and assisting the negotiation of such treaty stipulations; and should any differences arise as to right or property over the territory through which the said canal shall pass between the States or Governments of Central America, and such differences should in any way impede or obstruct the execution of the said canal, the Governments of the United States and Great Britain will use their good offices to settle such differences in the manner best suited to promote the interests of the said canal, and to strengthen the bonds of friendship and alliance which exist between the contracting parties.

ARTICLE VII

It being desirable that no time should be unnecessarily lost in commencing and constructing the said canal, the Governments of the United States and Great Britain determine to give their support and encouragement to such persons or company as may first offer to commence the same, with the necessary capital, the consent of the local authorities, and on such principles as accord with the spirit and intention of this convention; and if any persons or company should already have, with any State through which the proposed ship canal may pass, a contract for the construction of such a canal as that specified in this convention, to the stipulations of which contract neither of the contracting parties in this convention have

any just cause to object, and the said persons or company shall moreover have made preparations and expended time, money and trouble on the faith of such contract, it is hereby agreed that such persons or company shall have a priority of claim over every other person, persons or company to the protection of the Governments of the United States and Great Britain, and be allowed a year from the date of the exchange of the ratifications of this convention for concluding their arrangements, and presenting evidence of sufficient capital subscribed to accomplish the contemplated undertaking; it being understood that if, at the expiration of the aforesaid period, such persons or company be not able to commence and carry out the proposed enterprise, then the Governments of the United States and Great Britain shall be free to afford their protection to any other persons or company that shall be prepared to commence and proceed with the construction of the canal in question.

ARTICLE VIII

The Governments of the United States and Great Britain having not only desired, in entering into this convention, to accomplish a particular object, but also to establish a general principle, they hereby agree to extend their protection, by treaty stipulations, to any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America, and especially to the interoceanic communications, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by the way of Tehuantepec or Panama. In granting, however,

their joint protection to any such canals or railways as are by this article specified, it is always understood by the United States and Great Britain that the parties constructing or owning the same shall impose no other charges or conditions of traffic thereupon than the aforesaid Governments shall approve of as just and equitable; and that the same canals or railways, being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other State which is willing to grant thereto such protection as the United States and Great Britain engage to afford.

ARTICLE IX

The ratifications of this convention shall be exchanged at Washington within six months from this day, or sooner if possible.

In faith whereof we, the respective plenipotentiaries, have signed this convention and have hereunto affixed our seals.

Done at Washington the nineteenth day of April, anno Domini one thousand eight hundred and fifty.

JOHN M. CLAYTON. (L. S.)
HENRY LYTTON BULWER. (L. S.)

## THE SUEZ CANAL TREATY

### ARTICLE I

The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag.

Consequently, the High Contracting Parties agree not in any way to interfere with the free use of the canal, in time of war as in time of peace.

The canal shall never be subjected to the exercise of the right of blockade.

### ARTICLE II

The High Contracting Parties, recognizing that the fresh-water canal is indispensable to the maritime canal, take note of the engagements of His Highness the Khedive towards the Universal Suez Canal Company as regards the fresh-water canal; which engagements are stipulated in a convention bearing date the eighteenth of March, 1863, containing an *expose* and four articles.

They undertake not to interfere in any way with the security of that canal and its branches, the working of which shall not be exposed to any attempt at obstruction.

### ARTICLE III

The High Contracting Parties likewise undertake to respect the plant, establishments, buildings and works of the maritime canal and the fresh-water canal.

ARTICLE IV

The maritime canal remaining open in time of war as a free passage, even to the ships of war of belligerents, according to the terms of Article I of the present treaty, the High Contracting Parties agree that no right of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the canal, shall be committed in the canals and its ports of access, as well as within a radius of three marine miles from these ports, even though the Ottoman Empire should be one of the belligerent powers.

Vessels of war of belligerents shall not revictual or take in stores in the canal and its ports of access, except in so far as may be strictly necessary. The transit of the aforesaid vessels through the canal shall be effected with the least possible delay, in accordance with the regulations in force, and without any other intermission than that resulting from the necessities of the service.

Their stay at Port Said and in the roadstead of Suez shall not exceed twenty-four hours, except in case of distress. In such case they shall be bound to leave as soon as possible. An interval of twenty-four hours shall always elapse between the sailing of a belligerent ship from one of the ports of access and the departure of a ship belonging to the hostile power.

ARTICLE V

In time of war belligerent powers shall not disembark nor embark within the canal and its ports of access either troops, munitions or materials of war. But in case of an accidental hindrance in the canal, men may be embarked

or disembarked at the ports of access by detachments not exceeding one thousand men, with a corresponding amount of war material.

ARTICLE VI

Prizes shall be subjected, in all respects, to the same rules as the vessels of belligerents.

ARTICLE VII

The powers shall not keep any vessel of war in the waters of the canal (including Lake Timsah and the Bitter Lakes).

Nevertheless, they may station vessels of war in the ports of excess of Port Said and Suez, the number of which shall not exceed two for each power.

This right shall not be exercised by belligerents.

ARTICLE VIII

The agents in Egypt of the Signatory Powers of the present treaty shall be charged to watch over its execution. In case of any event threatening the security or the free passage of the canal, they shall meet on the summons of three of their number under the presidency of their Doyen, in order to proceed to the necessary verifications. They shall inform the Khedival Government of the danger of which they may have perceived, in order that that Government may take proper steps to insure the protection and the free use of the canal. Under any circumstances, they shall meet once a year to take note of the due execution of the treaty.

The last-mentioned meetings shall take place under

the presidency of a Special Commissioner nominated for that purpose by the Imperial Ottoman Government. A Commissioner of the Khedive may also take part in the meeting, and may preside over it in case of the absence of the Ottoman Commissioner.

They shall especially demand the suppression of any work or the dispersion of any assemblage on either bank of the canal, the object or effect of which might be to interfere with the liberty and the entire security of the navigation.

ARTICLE IX

The Egyptian Government shall, within the limits of its powers resulting from the Firmans, and under the conditions provided for in the present treaty, take the necessary measures for insuring the execution of the said treaty.

In case the Egyptian Government should not have sufficient means at its disposal, it shall call upon the Imperial Ottoman Government, which shall take the necessary measures to respond to such appeal; shall give notice thereof to the Signatory Powers of the Declaration of London of the seventeenth of March, 1885; and shall, if necessary, concert with them on the subject.

The provisions of Articles IV, V, VII and VIII shall not interfere with the measures which shall be taken in virtue of the present article.

ARTICLE X

Similarly, the provisions of Articles IV, V, VII and VIII shall not interfere with the measures which His Majesty the Sultan and His Highness the Khedive, in

the name of His Imperial Majesty, and within the limits of the Firmans granted, might find it necessary to take for securing by their own forces the defence of Egypt and the maintenance of public order.

In case His Imperial Majesty the Sultan, or His Highness the Khedive, should find it necessary to avail themselves of the exceptions for which this article provides, the Signatory Powers of the Declaration of London shall be notified thereof by the Imperial Ottoman Government.

It is likewise understood that the provisions of the four articles aforesaid shall in no case occasion any obstacle to the measures which the Imperial Ottoman Government may think it necessary to take in order to insure by its own forces the defence of its other possessions situated on the eastern coast of the Red Sea.

ARTICLE XI

The measures which shall be taken in the cases provided for by Articles IX and X of the present treaty shall not interfere with the free use of the canal. In the same cases, the erection of permanent fortifications contrary to the provisions of Article VIII is prohibited.

ARTICLE XII

The High Contracting Parties, by application of the principle of equality as regards the free use of the canal, a principle which forms one of the bases of the present treaty, agree that none of them shall endeavour to obtain with respect to the canal territorial or commercial advantages or privileges in any international arrangements

which may be concluded. Moreover, the rights of Turkey as the territorial power are reserved.

ARTICLE XIII

With the exception of the obligations expressly provided by the clauses of the present treaty, the sovereign rights of His Imperial Majesty the Sultan, and the rights and immunities of His Highness the Khedive, resulting from the Firmans, are in no way affected.

ARTICLE XIV

The High Contracting Parties agree that the engagements resulting from the present treaty shall not be limited by the duration of the Acts of Concession of the Universal Suez Canal Company.

ARTICLE XV

The stipulations of the present treaty shall not interfere with the sanitary measures in force in Egypt.

ARTICLE XVI

The High Contracting Parties undertake to bring the present treaty to the knowledge of the States which have not signed it, inviting them to accede to it.

ARTICLE XVII

The present treaty shall be ratified, and the ratifications shall be exchanged at Constantinople within the space of one month, or sooner, if possible.

In faith of which the respective plenipotentiaries have signed the present treaty, and have affixed to it the seal of their arms.

Done at Constantinople, the twenty-ninth day of the month of October, in the year 1888.

(Signed by Representatives of Great Britain, Germany, Austria, Spain, France, Italy, Netherlands, Russia and Turkey.)

## THE HAY–PAUNCEFOTE TREATY OF 1900

Showing the original treaty and the treaty as amended in one as follows:

(1) Amendments by the United States Senate are printed in italics.

(2) Article III, stricken out by the United States Senate, is printed in brackets.

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The United States of America and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, Empress of India, being desirous to facilitate the construction of a ship canal to connect the Atlantic and Pacific Oceans, and to that end to remove any objection which may arise out of the convention of April 19, 1850, commonly called the Clayton-Bulwer treaty, to the construction of such canal under the auspices of the Government of the United States, without impairing the "general principle" of neutralization established in Article VIII of that convention, have for that purpose appointed as their plenipotentiaries:

The President of the United States, John Hay, Secretary of State, of the United States of America;

And Her Majesty the Queen of Great Britain and Ireland, Empress of India, The Right Honorable Lord Pauncefote, G. C. B., G. C. M. G., Her Majesty's Ambassador Extraordinary and Plenipotentiary to the United States;

Who, having communicated to each other their full powers, which were found to be in due and proper form, have agreed upon the following articles:

ARTICLE I

It is agreed that the canal may be constructed under the auspices of the Government of the United States, either directly at its own cost or by gift or loan of money to individuals or corporations or through subscription to or purchase of stock or shares, and that, subject to the provisions of the present convention, the said Government shall have and enjoy all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal.

ARTICLE II

The High Contracting Parties, desiring to preserve and maintain the "general principle" of neutralization established in Article VIII of the Clayton-Bulwer convention, *which convention is hereby superseded*, adopt, as the basis of such neutralization, the following rules, substantially as embodied in the convention between Great Britain and certain other powers, signed at Constantinople October 29, 1888, for the Free Navigation of the Suez Maritime Canal, that is to say:

1. The canal shall be free and open, in time of war as in time of peace, to the vessels of commerce and of war of all nations, on terms of entire equality, so that there shall be no discrimination against any nation or its citizens or subjects in respect of the conditions or charges of traffic, or otherwise.

2. The canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed within it.

3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly necessary; and the transit of such vessels through the canal shall be effected with the least possible delay, in accordance with the regulations in force, and with only such intermission as may result from the necessities of the service.

Prizes shall be in all respects subject to the same rules as vessels of war of the belligerents.

4. No belligerent shall embark or disembark troops, munitions of war or warlike materials in the canal except in case of accidental hindrance of the transit, and in such case the transit shall be resumed with all possible despatch.

5. The provisions of this article shall apply to waters adjacent to the canal, within three marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than twenty-four hours at any one time except in case of distress, and in such case shall depart as soon as possible; but a vessel of war of one belligerent shall not depart within twenty-four hours from the departure of a vessel of war of the other belligerent.

*It is agreed, however, that none of the immediately foregoing conditions and stipulations in sections numbered one, two, three, four and five of this article shall apply to measures which the United States may find it necessary to take for securing by its own forces the defense of the United States and the maintenance of public order.*

6. The plant, establishments, buildings and all works

necessary to the construction, maintenance and operation of the canal shall be deemed to be part thereof, for the purposes of this convention, and in time of war as in time of peace shall enjoy complete immunity from attack or injury by belligerents and from acts calculated to impair their usefulness as part of the canal.

7. No fortifications shall be erected commanding the canal or the waters adjacent. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.

[ARTICLE III]

[The High Contracting Parties will, immediately upon the exchange of the ratifications of this convention, bring it to the notice of the other powers and invite them to adhere to it.]

ARTICLE IV

The present convention shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof, and by Her Britannic Majesty; and the ratifications shall be exchanged at Washington or at London within six months from the date hereof, or earlier if possible.

In faith whereof the respective plenipotentiaries have signed this convention and thereunto affixed their seals.

Done in duplicate at Washington the fifth day of February in the year of our Lord one thousand nine hundred.

JOHN HAY.
PAUNCEFOTE.

## THE HAY–PAUNCEFOTE TREATY OF 1901

The United States of America and His Majesty Edward the Seventh, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, and Emperor of India, being desirous to facilitate the construction of a ship canal to connect the Atlantic and Pacific Oceans, by whatever route may be considered expedient, and to that end to remove any objection which may arise out of the convention of the nineteenth of April, 1850, commonly called the Clayton-Bulwer treaty, to the construction of such canal under the auspices of the Government of the United States, without impairing the "general principle" of neutralization established in Article VIII of that convention, have for that purpose appointed as their plenipotentiaries:

The President of the United States, John Hay, Secretary of State of the United States of America;

And His Majesty Edward the Seventh, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, and Emperor of India, the Right Honourable Lord Pauncefote, G. C. B., G. C. M. G., His Majesty's Ambassador Extraordinary and Plenipotentiary to the United States;

Who, having communicated to each other their full powers, which were found to be in due and proper form, have agreed upon the following articles:

ARTICLE I

The High Contracting Parties agree that the present treaty shall supersede the afore-mentioned convention of the nineteenth of April, 1850.

ARTICLE II

It is agreed that the canal may be constructed under the auspices of the Government of the United States either directly at its own cost, or by gift or loan of money to individuals or corporations, or through subscription to or purchase of stock or shares, and that, subject to the provisions of the present treaty, the said Government shall have and enjoy all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal.

ARTICLE III

The United States adopts, as the basis of the neutralization of such ship canal, the following rules, substantially as embodied in the convention of Constantinople signed the twenty-eighth of October, 1888, for the free navigation of the Suez Canal, that is to say:

1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic or otherwise. Such conditions and charges of traffic shall be just and equitable.

2. The canal shall never be blockaded, nor shall any

right of war be exercised nor any act of hostility be committed within it. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.

3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly necessary; and the transit of such vessels through the canal shall be effected with the least possible delay in accordance with the regulations in force, and with only such intermission as may result from the necessities of the service.

Prizes shall be in all respects subject to the same rules as vessels of war of the belligerents.

4. No belligerent shall embark or disembark troops, munitions of war, or warlike materials in the canal, except in case of accidental hindrance of the transit, and in such case the transit shall be resumed with all possible dispatch.

5. The provisions of this article shall apply to waters adjacent to the canal, within three marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than twenty-four hours at any one time, except in case of distress, and in such case shall depart as soon as possible; but a vessel of war of one belligerent shall not depart within twenty-four hours from the departure of a vessel of war of the other belligerent.

6. The plant, establishments, buildings and all works necessary to the construction, maintenance and operation of the canal shall be deemed to be part thereof, for the purposes of this treaty, and in time of war, as in time of peace, shall enjoy complete immunity from attack or

injury by belligerents, and from acts calculated to impair their usefulness as part of the canal.

ARTICLE IV

It is agreed that no change of territorial sovereignty or of international relations of the country or counties traversed by the before-mentioned canal shall affect the general principle of neutralization or the obligation of the High Contracting Parties under the present treaty.

ARTICLE V

The present treaty shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof, and by His Britannic Majesty; and the ratifications shall be exchanged at Washington or at London at the earliest possible time within six months from the date hereof.

In faith whereof the respective plenipotentiaries have signed this treaty and hereunto affixed their seals.

Done in duplicate at Washington, the eighteenth day of November, in the year of our Lord one thousand nine hundred and one.

JOHN HAY. (SEAL.)
PAUNCEFOTE. (SEAL.)

# TREATY WITH PANAMA

A CONVENTION BETWEEN THE UNITED STATES AND THE REPUBLIC OF PANAMA FOR THE CONSTRUCTION OF A SHIP CANAL TO CONNECT THE WATERS OF THE ATLANTIC AND PACIFIC OCEANS, SIGNED NOVEMBER 18, 1903

The United States of America and the Republic of Panama being desirous to insure the construction of a ship canal across the Isthmus of Panama to connect the Atlantic and Pacific Oceans, and the Congress of the United States of America having passed an act approved June 28, 1902, in furtherance of that object, by which the President of the United States is authorized to acquire within a reasonable time the control of the necessary territory of the Republic of Colombia, and the sovereignty of such territory being actually vested in the Republic of Panama, the High Contracting Parties have resolved for that purpose to conclude a Convention and have accordingly appointed as their plenipotentiaries,—

The President of the United States of America, John Hay, Secretary of State, and

The Government of the Republic of Panama, Philippe Bunau-Varilla, Envoy Extraordinary and Minister Plenipotentiary of the Republic of Panama, thereunto specially empowered by said Government, who after communicating with each other their respective full powers, found to be in good and due form, have agreed upon and concluded the following articles:

ARTICLE I

The United States guarantees and will maintain the independence of the Republic of Panama.

ARTICLE II

The Republic of Panama grants to the United States in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said canal of the width of ten miles extending to the distance of five miles on each side of the center line of the route of the canal to be constructed; the said zone beginning in the Caribbean Sea, three marine miles from mean low water mark, and extending to and across the Isthmus of Panama into the Pacific Ocean to a distance of three marine miles from mean low water mark, with the proviso that the cities of Panama and Colon and the harbors adjacent to said cities, which are included within the boundaries of the zone above described, shall not be included within this grant. The Republic of Panama further grants to the United States in perpetuity the use, occupation and control of any other lands and waters outside of the zone above described which may be necessary and convenient for the construction, maintenance, operation, sanitation and protection of the said canal or of any auxiliary canals or other works necessary and convenient for the construction, maintenance, operation, sanitation and protection of the said enterprise.

The Republic of Panama further grants in like manner to the United States in perpetuity all islands within the

limits of the zone above described and in addition thereto the group of small islands in the Bay of Panama, named Perico, Naos, Culebra and Flamenco.

ARTICLE III

The Republic of Panama grants to the United States all the rights, power and authority within the zone mentioned and described in Article II of this agreement and within the limits of all auxiliary lands and waters mentioned and described in said Article II which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority.

ARTICLE IV

As rights subsidiary to the above grants the Republic of Panama grants in perpetuity to the United States the right to use the rivers, streams, lakes and other bodies of water within its limits for navigation, the supply of water or water-power or other purposes, so far as the use of said rivers, streams, lakes and bodies of water and the waters thereof may be necessary and convenient for the construction, maintenance, operation, sanitation and protection of the said canal.

ARTICLE V

The Republic of Panama grants to the United States in perpetuity a monopoly for the construction, maintenance and operation of any system of communication by

means of canal or railroad across its territory between the Caribbean Sea and the Pacific Ocean.

ARTICLE VI

The grants herein contained shall in no manner invalidate the titles or rights of private land holders or owners of private property in the said zone or in or to any of the lands or waters granted to the United States by the provisions of any article of this treaty, nor shall they interfere with the rights of way over the public roads passing through the said zone or over any of the said lands or waters unless said rights of way or private rights shall conflict with rights herein granted to the United States in which case the rights of the United States shall be superior. All damages caused to the owners of private lands or private property of any kind by reason of the grants contained in this treaty or by reason of the operations of the United States, its agents or employees, or by reason of the construction, maintenance, operation, sanitation and protection of the said canal or of the works of sanitation and protection herein provided for, shall be appraised and settled by a joint commission appointed by the Governments of the United States and of the Republic of Panama, whose decisions as to such damages shall be final and whose awards as to such damages shall be paid solely by the United States. No part of the work on said canal or the Panama railroad or on any auxiliary works relating thereto and authorized by the terms of this treaty shall be prevented, delayed or impeded by or pending such proceedings to ascertain such damages. The appraisal of said private lands and private property

and the assessment of damages to them shall be based upon their value before the date of this convention.

ARTICLE VII

The Republic of Panama grants to the United States within the limits of the cities of Panama and Colon and their adjacent harbors and within the territory adjacent thereto the right to acquire by purchase or by the exercise of the right of eminent domain, any lands, buildings, water rights or other properties necessary and convenient for the construction, maintenance, operation and protection of the canal and of any works of sanitation, such as the collection and disposition of sewage and the distribution of water in the said cities of Panama and Colon, which, in the discretion of the United States may be necessary and convenient for the construction, maintenance, operation, sanitation and protection of the said canal and railroad. All such works of sanitation, collection and dispostion of sewage and distribution of water in the cities of Panama and Colon shall be made at the expense of the United States, and the Government of the United States, its agents or nominees shall be authorized to impose and collect water rates and sewerage rates which shall be sufficient to provide for the payment of interest and the amortization of the principal of the cost of said works within a period of fifty years and upon the expiration of said term of fifty years the system of sewers and water works shall revert to and become the properties of the cities of Panama and Colon respectively, and the use of the water shall be free to the inhabitants of Panama and Colon, except to the extent that water rates may be necessary for the

operation and maintenance of said system of sewers and waters.

The Republic of Panama agrees that the cities of Panama and Colon shall comply in perpetuity with the sanitary ordinances whether of a preventive or curative character prescribed by the United States and in case the Government of Panama is unable or fails in its duty to enforce this compliance by the cities of Panama and Colon with the sanitary ordinances of the United States the Republic of Panama grants to the United States the right and authority to enforce the same.

The same right and authority are granted to the United States for the maintenance of public order in the cities of Panama and Colon and the territories and harbors adjacent thereto in case the Republic of Panama should not be, in the judgment of the United States, able to maintain such order.

ARTICLE VIII

The Republic of Panama grants to the United States all rights which it now has or hereafter may acquire to the property of the New Panama Canal Company and the Panama Railroad Company as a result of the transfer of sovereignty from the Republic of Colombia to the Republic of Panama over the Isthmus of Panama and authorizes the New Panama Canal Company to sell and transfer to the United States its rights, privileges, properties and concessions as well as the Panama Railroad and all the shares or part of the shares of that company; but the public lands situated outside of the zone described in Article II of this treaty now included in the concessions to

both said enterprises and not required in the construction or operation of the canal shall revert to the Republic of Panama except any property now owned by or in the possession of said companies within Panama or Colon or the ports or terminals thereof.

ARTICLE IX

The United States agrees that the ports at either entrance of the canal and the waters thereof and the Republic of Panama agrees that the towns of Panama and Colon shall be free for all time so that there shall not be imposed or collected custom house tolls, tonnage, anchorage, lighthouse, wharf, pilot or quarantine dues or any other charges or taxes of any kind upon any vessel using or passing through the canal or belonging to or employed by the United States, directly or indirectly, in connection with the construction, maintenance, operation, sanitation and protection of the main canal, or auxiliary works, or upon the cargo, officers, crew or passengers of any such vessels, except such tolls and charges as may be imposed by the United States for the use of the canal and other works, and except tolls and charges imposed by the Republic of Panama upon merchandise destined to be introduced for the consumption of the rest of the Republic of Panama, and upon vessels touching at the ports of Colon and Panama and which do not cross the canal.

The Government of the Republic of Panama shall have the right to establish in such ports and in the towns of Panama and Colon such houses and guards as it may deem necessary to collect duties on importations destined to other portions of Panama and to prevent contraband

trade. The United States shall have the right to make use of the towns and harbors of Panama and Colon as places of anchorage, and for making repairs, for loading, unloading, depositing or trans-shipping cargoes either in transit or destined for the service of the canal and for other works pertaining to the canal.

ARTICLE X

The Republic of Panama agrees that there shall not be imposed any taxes, national, municipal, departmental or of any other class upon the canal, the railways and auxiliary works, tugs and other vessels employed in the service of the canal, storehouses, workshops, offices, quarters for laborers, factories of all kinds, warehouses, wharves, machinery and other works, property, and effects appertaining to the canal or railroad and auxiliary works, or their officers or employees, situated within the cities of Panama and Colon, and that there shall not be imposed contributions or charges of a personal character of any kind upon officers, employees, laborers and other individuals in the service of the canal and railroad and auxiliary works.

ARTICLE XI

The United States agrees that the official dispatches of the Government of the Republic of Panama shall be transmitted over any telegraph and telephone lines established for canal purposes and used for public and private business at rates not higher than those required from officials in the service of the United States.

ARTICLE XII

The Government of the Republic of Panama shall permit the immigration and free access to the lands and workshops of the canal and its auxiliary works of all employees and workmen of whatever nationality under contract to work upon or seeking employment upon or in any wise connected with the said canal and its auxiliary works, with their respective families and all such persons shall be free and exempt from the military service of the Republic of Panama.

ARTICLE XIII

The United States may import at any time into the said zone and auxiliary lands, free of custom duties, imposts, taxes or other charges, and without any restrictions, any and all vessels, dredges, engines, cars, machinery, tools, explosives, materials, supplies and other articles necessary and convenient in the construction, maintenance, operation, sanitation and protection of the canal and auxiliary works, and all provisions, medicines, clothing, supplies and other things necessary and convenient for the officers, employees, workmen and laborers in the service and employ of the United States and for their families. If any such articles are disposed of for use outside of the zone and auxiliary lands granted to the United States and within the territory of the Republic; they shall be subject to the same import or other duties as like articles imported under the laws of the Republic of Panama.

ARTICLE XIV

As the price or compensation for the rights, powers and privileges granted in this convention by the Republic

of Panama to the United States, the Government of the United States agrees to pay to the Republic of Panama the sum of ten million dollars ($10,000,000) in gold coin of the United States on the exchange of the ratification of this convention and also an annual payment during the life of this convention of two hundred and fifty thousand dollars ($250,000) in like gold coin, beginning nine years after the date aforesaid.

The provisions of this article shall be in addition to all other benefits assured to the Republic of Panama under this convention.

But no delay or difference of opinion under this article or any other provisions of this treaty shall affect or interrupt the full operation and effect of this convention in all other respects.

ARTICLE XV

The joint commission referred to in Article VI shall be established as follows:

The President of the United States shall nominate two persons and the President of the Republic of Panama shall nominate two persons and they shall proceed to a decision; but in case of disagreement of the commission (by reason of their being equally divided in conclusion) an umpire shall be appointed by the two Governments, who shall render the decision. In the event of the death, absence or incapacity of a commissioner or umpire, or of his omitting, declining or ceasing to act, his place shall be filled by the appointment of another person in the manner above indicated. All decisions by a majority of the commission or by the umpire shall be final.

ARTICLE XVI

The two Governments shall make adequate provision by future agreement for the pursuit, capture, imprisonment, detention and delivery within said zone and auxiliary lands to the authorities of the Republic of Panama of persons charged with the commitment of crimes, felonies or misdemeanors without said zone and for the pursuit, capture, imprisonment, detention and delivery without said zone to the authorities of the United States of persons charged with the commitment of crimes, felonies and misdemeanors within said zone and auxiliary lands.

ARTICLE XVII

The Republic of Panama grants to the United States the use of all the ports of the Republic open to commerce as places of refuge for any vessels employed in the canal enterprise, and for all vessels passing or bound to pass through the canal which may be in distress and be driven to seek refuge in said ports. Such vessels shall be exempt from anchorage and tonnage dues on the part of the Republic of Panama.

ARTICLE XVIII

The canal, when constructed, and the entrances thereto shall be neutral in perpetuity, and shall be opened upon the terms provided for by Section 1 of Article III of, and in conformity with all the stipulations of, the treaty entered into by the Governments of the United States and Great Britain on November 18, 1901.

ARTICLE XIX

The Government of the Republic of Panama shall have the right to transport over the canal its vessels and its troops and munitions of war in such vessels at all times without paying charges of any kind. The exemption is to be extended to the auxiliary railway for the transportation of persons in the service of the Republic of Panama, or of the police force charged with the preservation of public order outside of said zone, as well as to their baggage, munitions of war and supplies.

ARTICLE XX

If by virtue of any existing treaty in relation to the territory of the Isthmus of Panama, whereof the obligations shall descend or be assumed by the Republic of Panama, there may be any privilege or concession in favor of the Government or the citizens and subjects of a third power relative to an interoceanic means of communication which in any of its terms may be incompatible with the terms of the present convention, the Republic of Panama agrees to cancel or modify such treaty in due form, for which purpose it shall give to the said third power the requisite notification within the term of four months from the date of the present convention, and in case the existing treaty contains no clause permitting its modifications or annulment, the Republic of Panama agrees to procure its modifications or annulment in such form that there shall not exist any conflict with the stipulations of the present convention.

ARTICLE XXI

The rights and privileges granted by the Republic of Panama to the United States in the preceding articles are understood to be free of all anterior debts, liens, trusts or liabilities, or concessions or privileges to other Governments, corporations, syndicates or individuals, and consequently, if there should arise any claims on account of the present concessions and privileges or otherwise, the claimants shall resort to the Government of the Republic of Panama and not to the United States for any indemnity or compromise which may be required.

ARTICLE XXII

The Republic of Panama renounces and grants to the United States the participation to which it might be entitled in the future earnings of the canal under Article XV of the concessionary contract with Lucien N. B. Wyse, now owned by the New Panama Canal Company, and any and all other rights or claims of a pecuniary nature arising under or relating to said concession, or arising under or relating to the concessions to the Panama Railroad Company or any extension or modification thereof; and it likewise renounces, confirms and grants to the United States, now and hereafter, all the rights and property reserved in the said concessions which otherwise would belong to Panama at or before the expiration of the terms of ninety-nine years of the concessions granted to or held by the above-mentioned party and companies, and all right, title and interest which it now has or may hereafter have, in and to the lands, canal, works, property and

rights held by the said companies under said concessions or otherwise, and acquired or to be acquired by the United States from or through the New Panama Canal Company, including any property and rights which might or may in the future either by lapse of time, forfeiture or otherwise, revert to the Republic of Panama under any contracts or concessions, with said Wyse, the Universal Panama Canal Company, the Panama Railroad Company and the New Panama Canal Company.

The aforesaid rights and property shall be and are free and released from any present or reversionary interest in or claims of Panama and the title of the United States thereto upon consummation of the contemplated purchase by the United States from the New Panama Canal Company, shall be absolute, so far as concerns the Republic of Panama, excepting always the rights of the Republic specifically secured under this treaty.

ARTICLE XXIII

If it should become necessary at any time to employ armed forces for the safety or protection of the canal, or of the ships that make use of the same, or the railways and auxiliary works, the United States shall have the right, at all times and in its discretion, to use its police and its land and naval forces or to establish fortifications for these purposes.

ARTICLE XXIV

No change either in the Government or in the laws and treaties of the Republic of Panama shall, without the

consent of the United States, affect any right of the United States under the present convention, or under any treaty stipulation between the two countries that now exists or may hereafter exist touching the subject matter of this convention.

If the Republic of Panama shall hereafter enter as a constituent into any other Government or into any union or confederation of States, so as to merge her sovereignty or independence in such Government, union or confederation, the rights of the United States under this convention shall not be in any respect lessened or impaired.

ARTICLE XXV

For the better performance of the engagements of this convention and to the end of the efficient protection of the canal and the preservation of its neutrality, the Government of the Republic of Panama will sell or lease to the United States lands adequate and necessary for naval or coaling stations on the Pacific coast and on the western Caribbean coast of the Republic at certain points to be agreed upon with the President of the United States.

ARTICLE XXVI

This convention when signed by the plenipotentiaries of the contracting parties shall be ratified by the respective Governments and the ratifications shall be exchanged at Washington at the earliest date possible.

In faith whereof the respective plenipotentiaries have signed the present convention in duplicate and have hereunto affixed their respective seals.

Done at the city of Washington the eighteenth day of November, in the year of our Lord nineteen hundred and three.

JOHN HAY. (SEAL.)
BUNAU-VARILLA. (SEAL.).